(16,883.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 302.

GERTRUDE J. NILES, APPELLANT,

vs.

CEDAR POINT CLUB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } ss:

Record of the proceedings of the circuit court of the United States within and for the western division of the northern district of Ohio in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Toledo, in said district, on the first Tuesday in June, being the first day of said month, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the 121st, to wit, on the 12th day of June, A. D. 1897.

Present: The Honorable John M. Harlan, circuit justice.

THE CEDAR POINT CLUB
vs.
GERTRUDE J. NILES. } Chancery. No. 1311.

Said action was commenced on the 18th day of December, A. D. 1895, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order, and on the dates hereinafter stated, to wit:

Bill of Complaint.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Plaintiff,
vs.
HENRY T. NILES, GERTRUDE J. NILES, FRANK NILES, Moses Burdo, and Black La Corse, Defendants. } In Equity.

To the honorable judges of the circuit court of the United States in and for the northern district of Ohio, western division:

2 The Cedar Point Club, a corporation organized under and pursuant to the laws of the State of Ohio, not incorporated for profit, and having its principal place of business in the city of Toledo, in said State, brings this, its bill of complaint, against Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, all of the county of Lucas and citizens of said State.

And now comes your orator and complains and says, that it is the owner in fee-simple, in the possession of, and entitled to the exclusive possession, use and enjoyment of the following-described real estate, situate in the county of Lucas and State of Ohio, and being in town 9 south of range 9 east of the Michigan meridian, to wit:

Lots numbered one (1), two (2) and three (3); the south half (½) of the southwest quarter (¼) and the northwest quarter (¼) of the southwest quarter (¼) of section (14); also lots numbered one (1), two (2), three (3), and four (4) of section fifteen (15); also the northeast quarter (¼) of the northeast quarter (¼); the east half (½) of the southeast quarter (¼) and the south half (½) of the northeast quarter (¼); lots numbered four (4), five (5), six (6), and seven (7), of section twenty-two (22); also lot numbered one (1), the west half (½) of the northeast quarter (¼); the southeast quarter (¼) of the northeast quarter (¼); the north half of the southeast quarter (¼), the south half of the southwest (¼); the north half of the southwest quarter (¼); the south half of the northwest quarter (¼); the north half of the northwest quarter (¼), and the south half of the southeast quarter (¼) of section twenty-three (23). Also lots numbered one (1), two (2), three (3), four (4); the southwest quarter (¼) of the southeast quarter (¼); the south half (½) of the southwest quarter (¼) and the northwest quarter (¼) of the southwest quarter (¼) of section twenty-four (24). Also lots numbered five (5), six (6), and seven (7); the north half (½) of the northeast quarter (¼), the south half of the northeast quarter (¼), and the north half of the northwest quarter (¼) of section twenty-five (25). Also lots numbered four (4) and five (5) the north half of the northeast quarter (¼) of section twenty-six (26), and also lot numbered three (3) of section twenty-seven (27), all containing 2,350 & $\frac{4}{10}$ acres of land.

Also the following-described premises situate in the county of Lucas and State of Ohio and being in township nine (9) south of range ten (10) east of the Michigan meridian, to wit: Lot numbered seven (7) of section twenty-nine (29). Also lots numbered one (1), two (2), three (3), four (4), five (5), and six (6); the southwest quarter (¼) of the northwest quarter (¼), the northeast quarter (¼) of the southwest quarter (¼) and the southwest quarter (¼) of the southeast quarter (¼) of section thirty (30). Also lots numbered five, six (6), and seven (7), the northeast quarter (¼) of the northwest quarter (¼), the southeast quarter (¼) of the northeast quarter (¼) and the north half of the northeast quarter (¼) of section thirty-one (31). Also lots numbered one (1), three (3), four (4), five (5), and six (6), the northwest quarter (¼) of the southeast quarter (¼), the north half (½) of the southwest quarter (¼) and the south half of the northwest quarter (¼) of section thirty-two (32). Also lot numbered one (1) of section thirty-three (33), all containing 1,110 $\frac{3}{10}$ acres of land.

Also the following-described premises situate in the county of Lucas and State of Ohio, and being in township ten (10), south of range ten (10), east of the Michigan meridian, to wit: Lot numbered one (1) of section two (2). Also lots numbered one (1), two (2), three (3), and four (4), the west half (½) of the southwest quarter (¼), and the southeast quarter (¼) of the southwest quarter (¼) of section three (3). Also lots numbered one (1), two (2), three (3), and four (4), the southwest quarter (¼) of the northeast quarter (¼), the north half (½) of the southeast quarter (¼), the south half (½) of the southeast quarter (¼), the east half of the northwest quarter (¼) and the

east half of the southwest quarter (¼) of section four (4). Also lots numbered five (5) and six (6) of section nine (9); also lots numbered six (6), seven (7), eight (8) and nine (9) of section ten (10); also lots numbered two (2), three (3), four (4), and five (5), the north half of the southwest quarter (¼) and the south half of the northwest quarter (¼) of section eleven (11), all containing 1,301.81 acres of land.

Your orator further says that the title to the hereinbefore-described premises came to your said orator by patents issued by the United States on the 25th day of July, 1882, to one H. Melville Hanna and thereafter by the said H. Melville Hanna, by good and sufficient deed, conveyed to the said The Cedar Point Club, complainant herein.

That said plaintiff under and by virtue of said patents and deed and no other source of title, is now and has been in the open, notorious, and except as hereinafter set forth exclusive and uninterrupted use, enjoyment and possession of said premises, for upwards of thirteen years last past.

That said patents to said Hanna and said deed by said Hanna to said Cedar Point Club were entered for record and recorded
4 in the recorder's office of Lucas county, Ohio, on or about the 11th day of March, 1885, and immediately transferred and entered in the name of your orator upon the tax-rolls or duplicate of said county; since which time the said plaintiff has annually and regularly paid all taxes and assessments that have been levied and assessed annually thereon.

That said lands are of the value of upwards of ten thousand dollars. That the matter in controversy or dispute exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

That said complainant has expended large sums of money, to wit: more than $10,000 in the care and improvement of said property for the uses, benefits, advantages and purposes for which the same is now and has been enjoyed by your orator.

Your orator further shows that the said defendants, Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, combining and confederating together have repeatedly entered upon said premises, well knowing the facts aforesaid, and have caused to be cut and removed therefrom large quantities of hay; also have caused to be placed, herded and pastured thereon a large number of horses and cattle, to wit: several hundred head, and have also plowed and planted thereon, without the consent of your orator, but against the objection and complaint of the said complainant herein.

That said defendants confederating and combining together, threaten to continue to so enter upon said premises, cut hay therefrom, pasture and herd their cattle thereon and plow and plant upon the same, and thereby and therein have often and repeatedly committed acts of trespass thereon, and give out in their talk and speech and threaten to continue to commit such depredations and acts of trespass thereon.

Your orator avers that the said defendants, jointly and severally, claim to justify said several alleged acts of trespass and threatened

acts of trespass, upon the ground that under the Constitution and laws of the United States the said patents are invalid, and that by reason of such invalidity thereof, the said patents failed to confer upon or vest in the said grantor of your orator any title whatever in or to the said premises and consequently the title to said described premises thereunder, is not now and never was in said complainant.

And your orator further avers and shows that the said defendants also make and assert some claim upon title, interest or estate
5 in and to the whole or some part of said premises aforesaid adverse to the estate and interest of said plaintiff and under and by virtue of some patents or grants from the United States made prior in date to the said patents to said H. Melville Hanna.

Your orator further shows that the matters and questions or either thereof thus in dispute or controversy between said plaintiff and said defendants arise under the Constitution and laws of the United States and not otherwise.

That the injury resulting from each act of trespass would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor. All of which acts of trespass have been against the will of your orator and in violation of your orator's rights and against its protest. All of which acts and doings are contrary to equity and good conscience and to the manifest injury of your orator in the premises.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end therefore, that the defendants may, if they can show why your orator should not have the relief hereby prayed and may make a full disclosure and discovery of all the matters aforesaid and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

That defendants jointly and severally may be restrained from any further violation of said rights, your orator prays that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining the said defendants, their agents, servants, workmen and employés and defendants' lessees and licensees from further entering upon said premises or cutting hay therefrom or plowing the same, or herding or pasturing cattle thereon, in violation of your orator's rights as aforesaid.

And your orator further prays that a provisional or preliminary injunction be issued restraining said defendants, each and all of them, their agents, servants and employés, lessees and licensees from any further acts of trespass upon said described premises.

And your orator further prays that the said defendants severally be compelled to answer herein and show their said title, and that the same may be determined to be null and void as against the said title of your said orator, and that complainant's title in and to said premises as against the claim of said defendants may be for-
6 ever quieted in it, its grantors, successors and assigns, and for

such other and further relief as the equity of the case may require and to your honors may seem mete.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

POTTER & EMERY,
Solicitors for Complainant and of Counsel.
CEDAR POINT CLUB,
By JOHN CUMMINGS, *Vice-Pres't.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division.

On this 18th day of December, A. D. 1895, before me personally appeared John Cummings, the vice-president of The Cedar Point Club, the complainant above named, who being by me duly affirmed, deposes and says that he is the vice-president of the Cedar Point Club, familiar with its business and that he has read the foregoing bill of complaint and knows the contents thereof. That the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to these matters he believes it to be true.

JOHN CUMMINGS.

Subscribed and sworn to before me this 18th day of December, A. D. 1895.

J. W. LYONS,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Endorsement on bill of complaint: 1311. U. S. circuit court, northern dist. of Ohio, western div. The Cedar Point Club *vs.* Henry T. Niles *et al.* In equity. Bill. Filed Dec. 18, 1895. Irvin Belford, clerk. Potter & Emery, solicitors for complainant.

Order for Preliminary Injunction.

December Term, A. D. 1895, to wit, December 18th, 1895.

7 Present: The Honorable Augustus J. Ricks, United States district judge.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES, GERTRUDE J. NILES, Frank Niles, Moses Burdo, and Black La Corse. } No. 1311. Chancery.

This day came the plaintiff in said above cause, The Cedar Point Club, by Potter & Emery, its solicitors and counsel, and thereupon

this cause came on for hearing and was heard upon the application of said plaintiff for a provisional injunction, as prayed for in its said bill of complaint, pending the final hearing and determination of said cause.

On consideration whereof, the court being now advised in the premises, it is ordered that a provisional injunction be and is hereby granted herein as prayed for in said bill restraining said defendants, Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, each and all of them, their agents, servants and employés, lessees and licensees from so trespassing or entering upon all or any of the premises described in said bill of complaint, or cutting or removing hay therefrom, or plowing the same or herding or pasturing horses or cattle thereon, or causing the same to be so done thereon; this order to remain in force until the further order of the court herein and conditioned upon the said plaintiff giving bond in the sum of five hundred dollars, to the acceptance of the clerk of said court, and conditioned according to law and the rules of this court.

It is further ordered that a copy of the foregoing provisional order be served upon each of said defendants, together with the writ of subpœna issued in said cause.

Subpœna in Chancery.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } ss:

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded, to summon Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo, Black La Corse, if they be found in your district, to be and appear in the circuit court of the United States, within and for the district aforesaid, at Toledo,
8 Ohio, on the first Monday in March next, to answer a certain bill in chancery, filed and exhibited in the said court against them by the Cedar Point Club.

Hereof they are not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of December, A. D. 1895, and in the 120th year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1895, otherwise the said bill may be taken *pro confesso.*

IRVIN BELFORD, *Clerk.*

Endorsements on subpœna when issued: No. 1311. United States circuit court, northern district of Ohio, western division. In chancery. The Cedar Point Club *vs.* Henry T. Niles *et al.* Subpœna. Returnable February 3, 1896. Rule day for appearance, February 3, 1896; rule day for answer, March 2, 1896. Potter & Emery, complainant's solicitors.

Endorsements on subpœna when returned:

Marshal's Return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 5th day of January, 1896, near Cedar Point, Ohio, I made due service of this writ upon the within-named Gertrude J. Niles, Frank Niles, Moses Burdo, and Black La Corse, and on the 6th day of January, 1896, at Toledo, on Henry T. Niles, by delivering to each a true and duly certified copy thereof with all endorsements thereon, and at the same time I delivered to each of the above-named persons a certified copy of order of injunction in this case.

W. C. HASKELL,
U. S. Marshal,
By D. HARMON, *Deputy.*

Service	$20 00
Copy	2 50
Exps. in lieu of travel	3 25
Return	10
	$25 85

9 Returned and filed Jan. 22, 1896.

IRVIN BELFORD, *Clerk.*

Undertaking for Costs.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311.

Stipulation for costs.

We hereby acknowledge ourselves security for all costs for which the complainant may be liable in the above-entitled suit.

JOHN CUMMINGS.
ARTHUR J. SECOR.

Endorsement on undertaking: No. 1311. The Cedar Point Club *vs.* Henry T. Niles *et al.* Stipulation for costs on part of complainant. Taken and filed Dec. 18, 1895. Irvin Belford, clerk.

Injunction Bond.

Know all men by these presents, that we, John Cummings and Arthur J. Secor, of Toledo, Ohio, are held and firmly bound unto Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, in the sum of five hundred ($500) dollars to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 18th day of December, A. D. 1895.

The condition of the above obligation is such that, whereas the Cedar Point Club, a corporation organized under and pursuant to and resident of the State of Ohio has filed in the circuit court of the United States for the northern district of Ohio, a bill in chancery against the said Henry T. Niles *et al.*, and has obtained an allowance of an injunction, as prayed for in said bill, from the — :

Now, if the said Cedar Point Club shall abide the decision of said court in said cause, and pay all moneys and costs, which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

JOHN CUMMINGS. [SEAL.]
ARTHUR J. SECOR. [SEAL.]

Endorsement on injunction bond: U. S. circuit court, northern district of Ohio. No. 1311. Cedar Point Club *vs.* Henry T. Niles *et al.* Injunction bond. Approved and filed Dec. 18, 1895. Irvin Belford, clerk.

Appearance of Defendants.

Order Book, vol. 3, page 159—December Term, 1895.

THURSDAY, *January 30th*, 1896.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } 1311.

I hereby enter the appearance of Henry T. Niles, Gertrude J Niles, Frank Niles, Moses Burdo and Black La Corse.

F. C. DAUGHERTY &
HENRY T. NILES,
Solicitors for Def'ts.

Answer and Cross-bill of Gertrude J. Niles.

In the Circuit Court of the United States in and for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Plaintiff, *vs.* HENRY T. NILES, GERTRUDE J. NILES, Frank Niles, Moses Burdo, and Black La Corse, Defendants.	In Equity.	No. 1311.

Answer and cross-bill of Gertrude J. Niles.

The said defendant, Gertrude J. Niles, for her answer and cross-bill herein, avers:

That she denies that the said plaintiff is the owner in fee-
11 simple or otherwise of the land in the said complaint described or any part or portion thereof and denies that said plaintiff is in possession thereof and denies that it is entitled to the possession thereof.

That said defendant, however, admits that patents were issued by the United States for the date in the said complaint alleged and set forth to one, H. Melville Hanna and that said Hanna did thereafter execute and deliver a deed therefor to the said plaintiff, but the defendant denies that the plaintiff is now or ever has been in the open, notorious and exclusive use, enjoyment and possession of the said premises or any part thereof.

The said defendant says, however, that she makes no claim to certain islands known and designated as "Cedar Point," "Sandy," and "Crane," and that should they or any of them as patented and sold by the United States be included in the description of the real estate in said bill set forth, that as to them or either of them her said denial has no application.

That defendant denies that said plaintiff has expended any moneys in the care and the improvement of said real estate.

That defendant avers that the survey and patents under which the said plaintiff claims title and possession were made without authority of law and in contravention thereof and that they are void and in good conscience ought by this court to be so declared;

For the said defendant avers that she is the owner in fee-simple and in possession of the following-described real estate, to wit:

Fractional sections twenty-two (22), twenty-seven (27), twenty-six (26), and twenty-five (25), in township nine (9) south of range nine (9) east, also fractional sections thirty (30), thirty-one (31), and thirty-two (32), in township nine (9) south of range ten (10) east, also fractional sections four (4), nine (9), ten (10), and eleven (11), of township ten (10) south of range ten (10) east.

That the title to said last-described fractional section was derived by patent issued to one Margaret Bailey on the 10th of July, 1844, of which the following is a true and exact copy:

"Number 17698.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, Margaret Bailey, of Champaigne county, Ohio, has deposited in the General Land Office of the United States a certificate of the register of the land office at Bucyrus, whereby it appears that full payment has been made by the said Margaret Bailey according to the provisions of the act of Congress of the 24th of April,
12 1820, entitled 'An act making further provision for the sale of public land' for fractional section eleven (11), in township ten (10), south of the Michigan base line of range ten (10), in the district of land subject to sale at Bucyrus, Ohio, containing twenty (20) acres and forty-five-hundredths of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant unto the said Margaret Bailey, and to her heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Margaret Bailey, and to her heirs and assigns forever.

In witness whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington on the tenth day of July, in the year of our Lord one thousand eight hundred and forty-four, and of the Independence of the United States the sixty-ninth.

By the President:

[SEAL.] JOHN TYLER,
By WILLIAM TYLER.

N. M. WHITNEY,
Recorder of the General Land Office."

That patents were issued by the United States to the said Margaret Bailey for the other said fractional sections hereinbefore described and they are similar and identical with the one herein set forth in full except as to the descriptions of the lands conveyed.

The said defendant avers that she holds title to said real estate hereinbefore described by an unbroken chain of title running back to and derived from, the said patents from the United States to the said Margaret Bailey hereinbefore described and that she and her grantors have had and held open, notorious, exclusive and adverse possession of the same from the date of the issue of said patents to the said Margaret Bailey.

The said defendant avers that said fractional sections so patented

and conveyed to the said Margaret Bailey and now owned
13 and possessed by the said defendant are a part of the land known and designated as the Congress lands of the United States, surveyed under the act of Congress of the date of May the 18th, 1796.

That at the time of the said survey and the patents made from the United States to the said Margaret Bailey and for many years thereafter the north line of the said fractional sections were at the water's edge and were the south shore of Lake Erie and the said sections were by the survey made under said act, so made fractional because they were, on the north side, bounded by Lake Erie.

The said defendant avers that the land- in the said complaint described adjoin and abut upon said fractional sections of said defendant's land throughout their entire length upon the north or lake side, so that the said north line of said defendant's land has meandered along the lake shore by the United States surveyor and the south line of the lands claimed by the plaintiff and described in the complaint are substantially the same and identical.

The said defendant avers that since the survey and patents made thereunder to the said Margaret Bailey the waters of Lake Erie have gradually receded from the shore as it existed at the time of the said survey and patents so that the land- described in the complaint, by reason of the waters of said lake having so gradually receded, *and* have become dry and solid land, located and situated between the premises of this defendant as hereinbefore described and the waters of Lake Erie, thus completely cutting off therefrom all access to said lake from said defendant's lands.

The said defendant says that the complainant's grantor procured the said land which had so become dry as aforesaid to be surveyed and patented at a time when the United States had no title to or right of any kind to the same and no power or authority to convey the same by patent or otherwise, and when by reason of the recession of the waters of said lake the said lands in the complaint described had become the property of the defendant, as a riparian owner, as reliction.

The said defendant therefore denies that she has ever trespassed upon the property of the said complainant and says that whatever occupancy and possession she has ever had or exercised has been under her claim to the ownership thereof as hereinbefore set forth.

Wherefore the said defendant prays this honorable court to dismiss the bill of said complainant, to set aside the patents issued to the said H. Melville Hanna and the deeds made by him to the said complainant and further prays that the title of said defendant
14 to said land may be forever quieted and for such other and further relief to which this defendant may in equity and conscience be entitled.

FRANK C. DAUGHERTY,
HENRY T. NILES,
Solicitors for Gertrude J. Niles.

Endorsement on answer and cross-bill of Gertrude J. Niles: No.

1311. The circuit court of the United States. The Cedar Point Club, plaintiff, *vs.* Henry T. Niles *et al.* Answer and cross-bill of Gertrude J. Niles. Filed Feb. 6, 1896. Irvin Belford, clerk. Frank C. Daugherty, solicitor for Gertrude J. Niles.

Replication.

In the United States Circuit Court, Northern District of Ohio, Western Division.

CEDAR POINT CLUB, Complainant,
vs.
HENRY T. NILES ET AL., Defendants. } No. 1311.

Replication of The Cedar Point Club, complainant, to the answer and cross-bill of Gertrude J. Niles.

The complainant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say, that *they* will aver, maintain and prove *their* said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant Gertrude J. Niles is uncertain, untrue and insufficient to be replied unto by this repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct and humbly pray- as in and by *their* said bill *they* have already prayed.

POTTER & EMERY,
Solicitors for Complainant.

April 17, 1896.

15 Endorsement on replication: U. S. circuit court, northern dist. of Ohio, western div. No. 1311. Cedar Point Club *vs.* Henry T. Niles *et al.* Replication. Filed April 17, 1896. Irvin Belford, clerk. Potter & Emery, solicitors for complainant.

Continuance.

December Term, A. D. 1895, to wit, May 16th, 1896.

Present: Honorable Henry F. Severens, U. S. district judge.
Honorable Augustus J. Ricks, U. S. district judge.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311. Chancery.

This cause is continued until the next term of this court.

Agreed Statement of Facts.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Complainant,
vs.
HENRY T. NILES, GERTRUDE J. NILES, FRANK Niles, Moses Burdo, and Black La Corse, Defendants.
} Agreed Statement of Facts.

The following facts are admitted and agreed upon for the purposes of the hearing, submission and determination of this cause:

1. The complainant hath been and is a body corporate as in and by its bill set forth and as such duly authorized to take and hold title to real estate situate as in and by its said bill mentioned and described.

2. During the years 1834 and 1835, Ambrose Rice, a deputy surveyor pursuant to a contract dated August 31, 1833, with the then surveyor general of the United States for Ohio, Indiana and the Territory of Michigan, surveyed and subdivided into sections, fractional townships 9 south in range 9 east, and 9 and 10 south
16 in range 10 east, from the Michigan meridian, and duly certified his field-notes of such survey and subdivision to the then surveyor general, Robert T. Lytle. The said field-notes of said Rice survey showing the township and section lines to post at boundary line of survey, so far as pertinent to the present issue, are in words and figures following:

In town 9 south, range 9 east.

North, between secs. 21 and 2, T. 9 S., R. 9 E., of the Mich. mer.

12.00 Enter a point of woods from west.
16.00 Leave woods and enter marsh.
26.25 To an Indian trail leading S. E.
40.00 Set a post in mound for the cor. of qur. secs.
55.40 To the S. margin of Maumee bay and set a post in mound of earth. Coal and turf.

East, between secs. 22 and 27, T. 9 S., R. 9 E., of the Mich. mer.

40.00 Set a post for the cor. of qur. sec. in prairie and raised a mound of coal, earth and turf.
52.05 Set a post from which a pin oak 10 in. diam. bears N. 34¾ W. 375 lks. dist.

North, between secs. 26 and 27, T. 9 S., R. 9 E., of Mich. mer.

18.32 To a W. oak 30 in. diam. in the line.
20.13 To a bur oak 24 in. diam. in the line.
24.03 To a bur oak 36 in. diam. in the line.
35.00 To a bayou course W. to E., 3 feet water.

40.00 Set a post for the cor. of qur. sec. from which a hickory 9 in. diam. bears N. 40 W. 11 lks. dist., and a R. elm 9 in. diam. bears N. 56 E. 12 lks. dist.
48.00 Enter great marsh.
67.00 Set a post. Land level, wet, 3d rate.

North, between sec. 25 and 26, T. 9 S., R. 9 E., of the Mich. mer.

20.33 To a W. elm 30 in. diam. on the line.
28.00 To a belt of marsh from N. W. to E.
40.09 Set a post for the corner of qur. sec. from which a W. elm 20 in. diam. bears S. 75 W. 8 lks. dist., and a locust 24 in. diam. bears N. 40 E. 28 lks. dist.
45.00 Set a post in edge of drowned marsh from which a W. elm 9 in. diam. bears S. 27 E. 189 lks. dist. and a hickory 9 in. diam. bears S. 14 W. 175 lks. dist.

17 North, on the E. bound. of sec. 25, T. 9 S., R. 9 E., of the Mich mer.

9.00 Enter a point of woods from west.
16.00 Leave the woods and enter a marsh.
24.00 Set a post from which a W. elm 36 in. diam. bears S. 31 W. 4.18 lks. dist., and a W. elm 24 in. diam. bears S. 36¾ E. 376 lks. dist.

In town 9 south, range 10 east.

North on the W. bound. of sec. 30, T. 9 S. R. of the mer.

9.00 Enter a point of woods from the west.
16.00 Leave the woods and enter a marsh.
24.00 Set a post for the cor. of qur. sec. from which a W. elm 36 in. diam. bears S. 31 W. 4.18 chs. dist., etc.; a W. elm 24 in. diam. bears S. 36¾ E. 3.76 chs. dist., etc.

East, between secs. 30 and 31, T. 9 S., R. 10 E., var. 3 degrees 05 minutes E.

10.00 To a flag marsh and set post in marsh from which a W. elm 24 in. diam. bears S. 37 W. 3.54 chs. dist., and a W. elm 24 in. diam. bears S. 1½ W. 2.91 chs. dist.

In town 10 south, range 10 east.

East, between secs. 4 and 9.

10.00 Set a cedar post in marsh.

North, between secs. 9 and 10.

19.11 To a R. oak 36 in. diam. in line.
40.00 To a post for the cor. of qur. secs. from which a W. elm 16 in. diam. bears N. 82, W. 24 chs. distant, and a bur oak 20 in. diam. bears N. 53, E. 11 chs. distant.
59.45 To a maple 18 in. diam. bears in the line.

71.00 Set a post in S. margin of marsh for the cor. of secs. 9 and 10, fracl., a B. ash 9 in. diam. bears S. 6, E. 1.38 chs. distant, etc., a B. ash 9 in. diam. bears S. 78 W. 2.77 chs. distant.

North, between secs. 10 and 11.

2.00 Set a post in the S. margin of flag marsh, from which a W. elm 30 in. diam. bears S. 59, E. 3.22 chs. distant.

East, between secs. 11 and 14.

36.00 To Crane creek 1.00 chs. wide, runs N. stagnant.
18 40.00 Set a post for the cor. of qur. secs. in inundated marsh.

75.00 Set a post in S. W. margin of inundated marsh of Lake Erie; a locust 18 in. diam. bears N. 89, W. 5.25 chs. distant. No bearing trees near. Land, wet prairie and marsh.

The said field-notes of said Rice's survey of the said line at the margin of the marsh, and being the line between the land surveyed by Rice and that surveyed by Marston, for and by way of subdivision into sections, are in the words and figures following:

Township 9 south, range 9 east, of the Mich. mer. (Ohio).

In section 22.

East, 2.00 to a flag marsh.
S. 12 E. 25.00 along margin of flag marsh.
S. 69 E. 29.00 N. 62 E. 13.50; east 3.00; S. 3 E. 23.00.
S. 23 E. 4.25 to post on the line between secs. 22 and 27.

In section 27.

S. 23 E. 22.25 S. 70 E. 15.00.
N. 23¼ E. 13.44 to the post on the line between secs. 26 and 27.

In section 26.

S. 60 E. 21.00
N. 42 E. 7.50
S. 56 E. 17.00
East 21.00
} Don't close by 20 chains.

S. 60 E. 5.39 to the post on the line between secs. 25 and 26.

In section 25.

N. 87 E. 21.50; S. 69 E. 14.00; S. 73 W. 19.50; S. 30 E. 9.00; S. 60 E. 9.50.
East 50.89 to the post on line between ranges 9 and 10 E.

Township 9 south, range 10 east, of the Mich. mer.

From post on the west line of sec. 30, thence in sec. 30.
S. 82 E. 12.00; S. 64 E. 19.00; south 2.00; S. 87 W. 22.00.
19 S. 16½ E. 10.69 to post on the line between secs. 30 and 31.
S. 35 E. 6.50 in section 31.

West 9.50 to mouth of bayou from W. 3.00 chs. wide.
South 12.50.
S. 43 E. 20.00 over bayou from south.
S. 86 E. 20.00; S. 65 E. 11.50; S. 48 E. 25.00; S. 46 W. 4.50.
S. 37 E. 27.03 to post cor. of secs. 5, 6, 31, and 32, in section 32.
N. 68 E. 23.00; S. 84 E. 45.00.
S. 76¼ E. 14.45 to post cor. of secs. 4, 5 and 32.

Township 10 S. of R. 10 E. of Mich. mer.

From the post cor. of secs. 4, 5, 32 and 33, thence:
S. 19 E. 20.00 in sec. 4.
S. 3¼ E. 61.20 to the post in line between secs. 4 and 9.
S. 50 E. 9.00 over a bayou in sec. 9.
S. 85 E. 50.00 over a bayou.
N. 84 E. 13.53 to the post on line between secs. 9 and 10.
N. 84 E. 30.00 in sec. 10.
S. 72 E. 10.00; N. 86½ E. 26.00.
East 15.00 to Fawn point.
South 2.00 S. 73 W. 30.00; south 15.00.
S. 83 E. 19.00 Little grove.
S. 43 E. 15.00. A point of woods from the west.
S. 29 W. 30.00.
S. 69 E. 14.16 to the post on line between secs. 10 and 11.
East 35.00 in sec. 11.
N. 85 E. 32.00.
S. 60 E. 9.40 to the post on line between secs. 11 and 14. In sec. 14.
S. 2.20 to the State line.

3. Said Lytle as such surveyor general from and in accordance with the said field-notes caused to be made descriptions of the said surveyed lands and a fair plat of said respective townships showing and describing the subdivisions thereof and marking all and singular the actually surveyed lines and the respective corners designated in and by the said survey and noted in the said certified field-notes thereof, and in each instance showing the length and course of the respective line, whether straight or meander, between the said marked corners constituting its termini, all in conformity to the said survey and the certified field-notes thereof, and made return thereof to the General Land Office.

20 4. Said plat showed the northerly line of the mainland portion of said survey, a line with its intersection of each township and section line, evidenced by a post placed at such intersection, as the said line was actually surveyed and marked as shown by said certified field-notes, beginning on the west line of section 19, in town 9 south range 9 east, and thence running in a general easterly and southerly, but meandering and tortuous course to and across the south line of section 11, in town 10 south, range 10 east.

5. The said plat showed the said line of said survey from the west line of said township to a point 2 chains easterly from its intersection of the line between sections 21 and 22 in town 9 range 9, to

be the shore of Maumee bay; and from that point southerly and easterly the plat shows this line on the northerly and easterly sides of fractional sections 22, 27, 26 and 25, in town 9, range 9, sections 30, 31 and 32 in town 9, range 10, and sections 4, 9, 10 and 11 in town 10, range 10, to be the boundary of what is called the "flag marsh" and "impassable water and marsh."

6. As shown in and upon said original plat, somewhat east of north from the point where this line of the survey crosses the north and south quarter line through section twenty-two, town 9, range 9, and about a mile and a half from it, began an island called Cedar island. This extended northerly for more than half a mile, and then southeasterly to a point opposite the said line along the northerly side of section 25 in said township. A short distance southeast of this another island began and extended southeasterly beyond the north line of section 5, in town 10, range 10, projected easterly. Then there was a narrow inlet. A third island began on the easterly side of this inlet, and extended southeasterly almost to what would be the east line of section 11, town 10, range 10. Between these islands and the tortuous line above described, was the space designated "flag marsh" and "impassable marsh and water." No surveyed lines other than the township lines crossed either the intervening marsh or the islands. The northwestern island was named "Cedar" and was the largest. The plat showed it as containing 53.83 acres, all in town 9, range 9. The one next east of it was marked as "Sandy island." The plat showed that 7.52 acres of it were in town 9, range 9; 28.49 acres in town 9, range 10 and 1.18 acres in town 10, range 10. The southeastern island was marked as "Crane island," containing 18.38 acres all in town 10, range 10. From the northwest end of Cedar island to the south-
21 east end of Crane island was about nine and one-half miles. Norman strait separated Cedar and Sandy islands. Lily strait lay between Sandy and Crane, and Crane creek entered the lake at the east end of Crane island.

The field-notes on the plat showed that the circumference of each island was surveyed or meandered. The plat and marginal field-notes also show that the southerly edge of the "flag marsh," "impassable marsh and water" was surveyed and that the lines of the fractional sections southerly of the said marsh and water, were identical with the southerly edge of the marsh. The computed areas of the fractional sections and of their respective subdivisions, as shown upon the said plat conformed to the area included within the said surveyed lines and did not nor any thereof include any part of either marsh, water or islands.

7. On July 10, 1844, eleven patents issued to Margaret Bailey, one whereof is fully and accurately set out in the answer of defendant, Gertrude J. Niles. The other ten of said patents are of same date and identical in form with this one, except as to description. The descriptions contained therein are respectively as follows:

"Fractional section twenty-two, in township nine south of the Michigan base line, of range nine, in the district of lands subject to

sale at Bucyrus, Ohio, containing one hundred and forty-two acres and fifteen-hundredths of an acre."

"Fractional section twenty-seven, in township nine south of the Michigan base line of range nine, in the district of land subject to sale at Bucyrus, Ohio, containing five hundred and eighty-eight acres and fifty-eight-hundredths of an acre."

"Fractional section twenty-six, in township nine, south of the Michigan base line of range nine, in the district of land subject to sale at Bucyrus, Ohio, containing four hundred and forty-three acres and ninety-four-hundredths of an acre."

"Fractional section twenty-five, in township nine, south of the Michigan base line of range nine, in the district of lands subject to sale at Bucyrus, Ohio, containing two hundred and forty-five acres and fifty-three-hundredths of an acre."

"Fractional section thirty in township nine, south of the Michigan base line of range ten, in the district of lands subject to sale at Bucyrus, Ohio, containing thirty-four acres and eighty-six-hundredths of an acre."

"Fractional section thirty-one in township nine, south of
22 the Michigan base line of range ten, in the district of lands subject to sale at Bucyrus, Ohio, containing three hundred and twenty acres and seventy-two-hundredths of an acre."

"Fractional section thirty-two in township nine, south of the Michigan base line of range ten, in the district of land subject to sale at Bucyrus, Ohio, containing thirty-three acres and seventy-two-hundredths of an acre."

"Fractional section four in township ten, south of the Michigan base line of range ten, in the district of land subject to sale at Bucyrus, Ohio, containing fifty-six acres and thirty-hundredths of an acre."

"Fractional section nine in township ten, south of the Michigan base line of range ten, in the district of land subject to sale at Bucyrus, Ohio, containing five hundred and eighty-five acres and nine-hundredths of an acre."

"Fractional section ten in township ten, south of the Michigan base line of range ten, in the district of land subject to sale at Bucyrus, Ohio, containing four hundred and ninety-four acres and twenty-hundredths of an acre."

8. That all right and title conveyed by the United States to Margaret Bailey in and by the said several patents passed by mesne conveyances to, and, was at the commencement of this suit vested in the defendant Gertrude J. Niles, but said Margaret Bailey did not acquire nor hath defendant Gertrude J. Niles by title derived under the said patents or otherwise ever acquired title to the said islands or any part of either thereof.

9. On September 16, 1861, patent issued to Chester W. Norton, in the words and figures following:

Number 15976.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, Chester Willis Norton, of Wood county, Ohio, has deposited in the General Land Office of the United States a certificate of the register of the land office at Defiance, whereby it appears that full payment has been made by the said Chester W. Norton according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands" for the lot known as Cedar point, east of Maumee bay, in township nine, south of range nine, east of the Michigan meridian in the district of lands formerly subject to sale at Defiance now Chillicothe, Ohio, containing thirty-four acres and eighty-nine-hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land
23 Office by the surveyor general, which said tract has been purchased by the said Chester Willis Norton.

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant unto the said Chester Willis *Morton* and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Chester Willis Norton, and to his heirs and assigns forever. Subject to a reservation in favor of the United States for such quantity of land as would be requisite for the purposes should the Government hereafter desire to erect a light-house upon any part of the tract.

In witness whereof I, Abraham Lincoln, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-one, and of the Independence of the United States the eighty-sixth.

By the President:

ABRAHAM LINCOLN,
By W. O. STODDARD, *Sec'y.*

[SEAL.]
J. N. GRANGER,
Recorder of the General Land Office.

10. On October 10, 1876, a patent issued to Arthur Dudley Howell, reading thus:

"*Certificate No.* 20126.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, Arthur Dudley Howell, of Lucas county, Ohio, has deposited in the General Land Office of the United States a certificate

of the register of the land office at Chillicothe, Ohio, whereby it appears that full payment has been made by said Arthur Dudley Howell, according to the act of Congress of the 24th of April, 1820, entitled 'An act making further provisions for the sale of the public lands,' for Sandy island and Crane island, on the shore of Lake Erie, in section 24, in township 9, of range 9 east, and in sections 19, 29, 30, 32 and 33 in township 9 south of range 10 east, and in sections 2, 3, 4 and 11, in township 10, south of range 10,
24 East Michigan meridian, in the district of lands subject to sale at Chillicothe, Ohio, containing fifty-five and fifty-seven-hundredths of an acre, according to the official plat of the surveyor of the said lands, returned to the surveyor general, which said tracts have been purchased by the said Arthur Dudley Howell. Now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided have given and granted, and by these presents do grant unto the said Arthur Dudley Howell, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatever nature thereto belonging unto the said Arthur Dudley Howell, his heirs and assigns forever.

In testimony of which I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand, at the city of Washington, the tenth day of October, in the year one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

By the President:

U. S. GRANT,
By D. D. CONE, *Sec'y.*

[SEAL.]
W. S. CLARK,
Recorder of Gen. Land Office."

11. In April and May, 1881, John B. Marston, a civil engineer residing in Lucas county, under the instructions from the Commissioner of the General Land Office of date April 2, 1881, surveyed and subdivided into sections the area which was as aforesaid in and upon the surveyor general's plat of Ambrose Rice's survey designated as "flag marsh" and "impassable marsh and water" in said town 9 south, range 9 east, and towns 9 and 10 south, range 10 east; and on May 28, 1881, duly certified his field-notes of said survey to the then Commissioner of the General Land Office.

This survey was so made, and the area surveyed so subdivided into sections and parts of sections, as to complete and render full, to the extent that the area so then surveyed was in form suitable therefor, the sections which in said Rice's survey were rendered fractional by omission and exclusion from said survey of area designated as "flag marsh" and "impassable marsh and water."

The boundary line on the westerly side of the area so sur-
25 veyed by said Marston, from the point 2.75 chains easterly of the section line between sections 21 and 22, in town 9, range

9, extending somewhat east of north to the southerly extremity of the west part of Cedar island is the shore of Maumee bay; and, the boundary line on the southerly and westerly sides of said survey, from the point 2.75 chains easterly of the said line between sections 21 and 22 extending southerly and easterly to the outlet of Crane creek, in section 11, town 10, range 10, is identical with the boundary line between the surveyed lands and the "flag marsh" and "impassable marsh and water," as shown upon the said plat of the survey made by Ambrose Rice.

12. In the line of his duty the surveyor general caused to be made descriptions of the lands so surveyed by said Marston, and plats of the said respective townships showing the subdivisions of the sections and marks of the corners of the land so surveyed and made return thereto to the General Land Office. That the subdivisions of said respective sections and parts of sections are shown and designated in and upon the said plats as described in the bill of complaint herein.

13. That on the 25th day of July, 1882, a patent issued to H. Mellville Hanna in the words and figures following:

"THE UNITED STATES OF AMERICA:

Chillicothe Series, Certificate No. 20133.

To all to whom these presents shall come, Greeting:

Whereas, H. Mellville Hanna, of Cuyahoga county, Ohio, has deposited in the General Land Office of the United States a certificate of the Commissioner and *ex officio* register of the Land Office at Washington, District of Columbia, whereby it appears that full payment has been made by the said H. Melville Hanna according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of public lands' and the acts supplemental thereto, for the lot numbered one of section fourteen in township nine, south of range nine east of Michigan meridian, in Ohio, containing forty-eight acres and five-hundredths of an acre according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said H. Mellville Hanna.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts
26 of Congress in such case made and provided, have given and granted and by these presents do give and grant, unto the said H. Mellville Hanna, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said H. Mellville Hanna and to his heirs and assigns forever.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made

patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

By the President:

CHESTER A. ARTHUR.
O. L. JUDD, *Ass't Secretary.*

[SEAL.] L. HARRISON,
Recorder of the General Land Office, ad Interim."

Other patents of same date and identical in form with this, except as to description, issued to said Hanna purporting to convey to him the lands in and by the said respective patents described, to wit:

"Lot numbered two of section fourteen in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-three acres and sixteen-hundredths of an acre."

"Lot numbered three of section fourteen in township nine south of range nine east of Michigan meridian, in Ohio, containing forty-nine acres and ninety-five-hundredths of an acre."

"The south half of the southwest quarter of section fourteen in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The northwest quarter of the southwest quarter of section fourteen in township nine south of range nine east of Michigan meridian, in Ohio, containing forty acres."

"Lot numbered one of section fifteen in township nine south of range nine east of Michigan meridian, in Ohio, containing fifty-one acres and fifty-hundredths of an acre."

"Lot numbered two of section fifteen in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-eight acres and thirty-hundredths of an acre."

"Lot numbered three of section fifteen in township nine
27 south of range nine east of Michigan meridian, in Ohio, containing thirty-two acres and thirty-eight-hundredths of an acre."

"Lot numbered four of section fifteen in township nine south of range nine east of Michigan meridian, in Ohio, containing twenty acres and twenty-five-hundredths of an acre."

"The northeast quarter of the northeast quarter of section twenty-two, in township nine south of range nine east of Michigan meridian, in Ohio, containing forty acres."

"The east half of the southeast quarter of section twenty-two in township nine south of range nine east of Michigan meridian in Ohio, containing eighty acres."

"The south half of the northeast quarter of section twenty-two in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered four of section twenty-two, in township nine of

range nine east of Michigan meridian, in Ohio, containing forty-six acres and seventy-five-hundredths of an acre."

"Lot numbered five of section twenty-two, in township nine south of range nine east of Michigan meridian, in Ohio, containing fifty-four acres and sixty-hundredths of an acre."

"Lot numbered six of section twenty-two, in township nine south of range nine east of Michigan meridian, in Ohio, containing seventy-five acres."

"Lot numbered seven of section twenty-two in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-three acres and twenty-five-hundredths of an acre."

"Lot numbered one of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-one acres and forty-five-hundredths of an acre."

"The west half of the northeast quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The southeast quarter of the northeast quarter of section twenty-three, in township nine south of range nine east of Michigan meridian, in Ohio, containing forty acres."

"The north half of the southeast quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the southwest quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

28 "The north half of the southwest quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the northwest quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The north half of the northwest quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the southeast quarter of section twenty-three in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The lot numbered one of section twenty-four in township nine south of range nine east of Michigan meridian, in Ohio, containing twenty-one acres."

"Lot numbered two of section twenty-four in township nine south of range nine east of Michigan meridian, in Ohio, containing eighteen acres and ninety-eight-hundredths of an acre."

"Lot numbered three of section twenty-four in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-nine acres."

"Lot numbered four of section twenty-four in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-four acres and thirty-seven-hundredths of an acre."

"The southwest quarter of the southeast quarter of section twenty-

four in township nine south of range nine east of Michigan meridian, in Ohio, containing forty acres."

"The south half of the southwest quarter of section twenty-four in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The northwest quarter of the southwest quarter of section twenty-four, in township nine south of range nine east of Michigan meridian, in Ohio, containing forty acres."

"Lot numbered five of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing fifty-nine acres and thirty-hundredths of an acre."

"Lot numbered six of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-one acres and seventeen-hundredths of an acre."

"Lot numbered seven of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing sixty-four acres."

29 "The north half of the northeast quarter of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the northeast quarter of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"The north half of the northwest quarter of section twenty-five in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered four of section twenty-six in township nine south of range nine east of Michigan meridian in Ohio, containing eighty-two acres and ninety-hundredths of an acre."

"Lot numbered five of section twenty-six in township nine south of range nine east of Michigan meridian, in Ohio, containing thirty-three acres and sixteen hundredths of an acre."

"The north half of the northeast quarter of section twenty-six in township nine south of range nine east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered three of section twenty-seven in township nine south of range nine east of Michigan meridian, in Ohio, containing fifty-one acres and fifty-two-hundredths of an acre."

"Lot numbered seven of section twenty-nine in township nine south of range ten east of Michigan meridian, in Ohio, containing twelve acres and seventy-five-hundredths of an acre."

"Lot numbered one of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing forty-one acres and fifty-three-hundredths of an acre."

"Lot numbered two of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing thirty-two acres and fifty-hundredths of an acre."

"Lot numbered three of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing twenty-six acres."

"Lot numbered four of section thirty in township nine south of

range ten east of Michigan meridian, in Ohio, containing twenty-one acres and seventy-five-hundredths of an acre."

"Lot numbered five of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing thirty-five acres and eighty-two-hundredths of an acre."

"Lot numbered six of section thirty in township nine south
30 of range ten east of Michigan meridian, in Ohio, containing forty-nine acres and thirty-hundredths of an acre."

"The southwest quarter of the northwest quarter of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The northeast quarter of the southwest quarter of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The southwest quarter of the southeast quarter of section thirty in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"Lot numbered five of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing fifty-five acres."

"Lot numbered six of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing thirty-seven acres and forty-hundredths of an acre."

"Lot numbered seven of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing sixty-three acres and seventy-nine-hundredths of an acre."

"The northeast quarter of the northwest quarter of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The southeast quarter of the northeast quarter of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The north half of the northeast quarter of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered one of section thirty-one in township nine south of range ten east of Michigan meridian, in Ohio, containing fifty-six acres and sixty-eight-hundredths of an acre."

"Lot numbered three of section thirty-two in township nine south of range ten east of Michigan meridian, in Ohio, containing thirty-nine acres and thirty-three-hundredths of an acre."

"Lot numbered four of section thirty-two in township nine south of range ten east of Michigan meridian, in Ohio, containing forty-three acres and ninety-eight-hundredths of an acre."

"Lot numbered five of section thirty-two in township nine south
of range ten east of Michigan meridian, in Ohio, containing
31 twenty-three acres and twenty-five-hundredths of an acre."

"Lot numbered six of section thirty-two in township nine south of range ten east of Michigan meridian, in Ohio, containing thirty-nine acres and eighty-five-hundredths of an acre."

"The northwest quarter of the southeast quarter of section thirty-

two in township nine south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The north half of the southwest quarter of section thirty-two in township nine south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the northwest quarter of section thirty-two in township nine south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered one of section thirty-three in township nine south of range ten east of Michigan meridian, in Ohio, containing ninety-one acres and seventy-one-hundredths of an acre."

"Lot numbered one of section two in township ten south of range ten east of Michigan meridian, in Ohio, containing four acres."

"Lot numbered one of section three in township ten south of range ten east of Michigan meridian, in Ohio, containing twenty-seven acres and forty-six-hundredths of an acre."

"Lot numbered two of section three in township ten south of range ten east of Michigan meridian, in Ohio, containing fifty-six acres and fourteen-hundredths of an acre."

"Lot numbered three of section three in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-five acres and sixty-hundredths of an acre."

"Lot numbered four of section three, in township ten south of range ten east of Michigan meridian, in Ohio, containing twenty-one acres and eight-hundredths of an acre."

"The west half of the southwest quarter of section three, in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The southeast quarter of the southwest quarter of section three in township ten south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"Lot numbered one of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing forty-seven acres and eighty-hundredths of an acre."

32 "Lot numbered two of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-four acres and ninety-hundredths of an acre."

"Lot numbered three of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing fifty-eight acres and eighty-five-hundredths of an acre."

"Lot numbered four of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing forty-four acres and fifty-eight-hundredths of an acre."

"The southwest quarter of the northeast quarter of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing forty acres."

"The north half of the southeast quarter of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the southeast quarter of section four in town-

ship ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The east half of the northwest quarter of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The east half of the southwest quarter of section four in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"Lot numbered five of section nine in township ten south of range ten east of Michigan meridian, in Ohio, containing seventeen acres and fifty-one-hundredths of an acre."

"Lot numbered six of section nine in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-six acres and seventy-three-hundredths of an acre."

"Lot numbered six of section ten in township ten south of range ten east of Michigan meridian, in Ohio, containing twenty-nine acres and eighty-hundredths of an acre."

"The lot numbered seven of section ten in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty acres and thirty-nine-hundredths of an acre."

"Lot numbered eight of section ten in township ten south of range ten east of Michigan meridian, in Ohio, containing sixty-four acres and fifty-five-hundredths of an acre."

"Lot numbered nine of section ten in township ten south
33 of range ten east of Michigan meridian, in Ohio, containing twenty-one acres and seventy-one-hundredths of an acre."

"Lot numbered two of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing twenty-two acres and ten-hundredths of an acre."

"Lot numbered three of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-eight acres."

"Lot numbered four of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-six acres."

"Lot numbered five of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing thirty-four acres and sixty-one-hundredths of an acre."

"The north half of the southwest quarter of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

"The south half of the northwest quarter of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing eighty acres."

14. On June 14, 1884, a patent issued to Philip Lacourse, reading thus:

"THE UNITED STATES OF AMERICA:

Certificate No. 20232.

To all to whom these presents shall come, Greeting:

Whereas, Philip Lacourse, of Lucas county, Ohio, has deposited in the General Land Office of the United States a certificate of the Commissioner and *ex officio* register of the Land Office at Washington, D. C., whereby it appears that full payment has been made by the said Philip Lacourse according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands' and the acts supplemental thereto for the lots numbered one and six of section eleven in township ten south of range ten east of Michigan meridian, in Ohio, containing ninety-nine acres and forty-one-hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Philip Lacourse.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Philip Lacourse and to his heirs the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging unto the said Philip Lacourse and to his heirs and assigns forever.

34

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fourteenth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

By the President:

[SEAL.] CHESTER A. ARTHUR,
By W. H. CROOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office."

15. That all right and title conveyed by the United States to said Chester W. Norton, H. Mellville Hanna and Philip Lacourse respectively, in and by the said respective patents, hath been by mesne conveyances conveyed to complainant herein more than four years prior to the commencement of this suit and was then and continuously thereafter to and at the commencement of this suit vested in the said complainant.

16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage and there was more than the usual volume of water standing upon the land

in controversy herein and flowing to and upon the same from the large bodies of land now in Ottawa, Wood and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein.

17. The general character, description and condition of the said land surveyed by said Marston was by him correctly set forth under the title "General description" in the field-notes of the said survey so as aforesaid by him certified to the Commissioner of the General Land Office.

That concerning the portion of said survey in town 9 south, range 9 east, reciting, to wit:

"The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it particularly in the south and west parts are mown for a kind of coarse hay. Other parts are
35 filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which without any well-defined channel, finds its way across the marsh to the lake. Again in heavy gales of wind it is subject to inundations from the lake, which upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded along the lake by a sand beach averaging 1 chain in width, and 3 feet in height."

That concerning the portion of said survey in town 9 south, range 10 east, reciting, to wit:

"The surface of this fractional township is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the twp. south. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the drainage from wood on the south and west, which spreads over the entire surface and without any positive channel finds its way to the lake.

"Again the twp. is subject to inundations from the lake during heavy gales of wind which upon the termination of the gale, or a change in the direction of the wind, slowly finds its way back into the lake.

"This fractional twp. is bounded on the northeast by Lake Erie, between the lake and the marsh proper, is a sand beach, averaging 3 feet high and 1 chain in width, generally covered with bushes and small trees of oak, poplar, willow and cottonwood."

That concerning the portion of said survey in town 10 south, range 10 east, reciting, to wit:

"The description for this township must necessarily be similar to that of the two preceding townships. The surface of that part of the twp. comprised in this survey is one large swampy marsh, land generally very wet and boggy. Its surface is covered with grass canes (or joint grass) wild rice, and such like marsh productions, reaching to a height of ten or more feet. Some parts, especially on sec. 10 & 11 can be pastured, but the larger portion is filled with bogs and pond holes, connected by narrow and tortuous channels.

"It receives the drainage from the woods on the south and west and is subject to inundations from the lake. On the prevalence of strong S. W. winds this water flows from the marsh into the lake, and upon the occurrence of N. E. winds the lake floods the marsh. The principal outlets and inlets are Crane creek and Ward's canal.

36 This canal is an improvement made by C. B. Ward, of Detroit, Michigan, on sec. 4, and running across sec. 5 for the purpose of getting vessels and ship timber from his ship yard on sec. 5. It is built without locks and is really only a great ditch. Waterway 50 feet. Depth 7 feet. The buildings (or sheds) at the fishing stations 4 & 11 are the only other improvements."

A comparison of the survey made by Ambrose Rice in 1834 and 1835, with that made by John B. Marston in 1881, indicates that Sandy and Crane islands washed somewhere shoreward during the period intervening between the making of said respective surveys.

18. By reason of unusual drouth which during the years 1893, 1894 and 1895, prevailed quite generally over the region of country from which Lake Erie and its tributaries derive their waters, including that the drainage whereof was to and through the premises in controversy, the major portion of the said premises was dry during the summer of 1895, except in case of heavy local rains or when the adjacent waters of Lake Erie were higher than they usually were during that summer.

19. Evidence may be offered by and on behalf of either party whereby to establish or controvert the truth of any matter not herein agreed upon and concerning which issue is joined by the pleadings in said cause.

20. The copies of field-notes set forth as "Exhibit C" and "Exhibit D" and the copy of circular set forth as "Exhibit G" in the printed record in the case of James *v.* Howell and James *v.* Farley, lately pending in Lucas county, Ohio, district court, and the "blueprint" copy of profile showing stages of water in Lake Erie as observed and recorded by the U. S. Government office, at Cleveland, Ohio, and the plats of townships 9 south, in range 9 east, and 9 and 10 south, in range 10 east, certified by S. M. Lamoreux, as Commissioner of the General Land Office on January 3, 1896, and the plats and field-notes of parts of same townships as surveyed by John B. Marston and certified by Wm. A. J. Sparks, as Commissioner of the General Land Office, on April 28, 1885, shall be admissible as evidence for any and every purpose and of the same effect as duly authenticated and certified exemplification of the original subject to the right of either party to prove by competent evidence any clerical, typographical or other error in any such copy.

POTTER & EMERY,
Attorneys for Complainant.
H. T. NILES AND
F. C. DAUGHERTY,
Attorneys for Defendants.

37 Endorsement on agreed statement of facts: U. S. circuit court, N. dist. of Ohio. No. 1311. Cedar Point Club *v.* Niles *et al.* Filed Jun- 22, 1896. Irvin Belford, clerk.

The United States Court for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL.

Testimony of Elmer L. Spofford.

ELMER L. SPOFFORD, being first duly sworn, being a witness called in behalf of the defendant-, testified as follows, upon examination by Mr. Niles:

Q. Your name, residence and occupation?

A. Elmer L. Spofford, my residence is Bowling Green, Ohio, and my occupation is that of a civil engineer.

Q. Please state what means you have of knowing of the drainage from Wood, Ottawa and Lucas counties, through the Cedar Point marsh into Lake Erie?

A. I am the engineer on the Cedar Point Creek joint ditch, that is 30 miles in length. There are about 19 miles of that ditch in Wood county. From the point where it crosses the Wood County line, between Wood and Ottawa the distance is about 11 miles through to its outlet.

Q. And what other drainage is there?

A. South of this creek is Crane creek, it has its initial point in Wood county. The length of that I don't remember. It is some years since I took the levels on that. If I remember rightly it is about 9 miles in Wood county, or in that neighborhood.

Q. How far from there to its outlet?

A. As I understand from the surveyor of Ottawa county it is between 16 and 17 miles.

Q. What other creek is there?

A. To the north of Cedar creek and as a tributary to it in Wood county is what is known as Dry creek, 13 miles in length which discharges its waters into Cedar creek, about one mile east of the Wood County line in Ottawa county. North of that—I am starting in section 33 Ross township—is what is known as Wolf creek, this runs to the north and east through this township of Ross
38 and discharges its waters in the marsh somewheres—I don't know the outlet.

Q. I understand you to say that Wolf Creek ditch drains into this marsh?

A. It discharges its waters to the northeast. I was just mentioning the drainage of the Wood County lines giving the main channels.

Mr. NILES:

Q. Are all these ditches in the line of the natural drainage of the county?

A. So far as I know in Wood county.

Q. What scope of country in Wood, I mean of the upland in

Wood, Ottawa and Lucas in your judgment naturally drains through these water-courses?

A. In Wood county what is known as Crane creek drains about eight thousand eight hundred and fifty acres—I would put that at nine thousand acres that creek drains in Wood county.

Q. How much in Ottawa?

A. I could not answer that except approximately. It would drain about fourteen thousand acres or fifteen more nearly.

Q. Dry and Cedar creek?

A. Taken together they will drain a territory in Wood county of about twenty-four thousand acres.

Q. In Ottawa and Lucas?

A. I am not so familiar with the drainage for the reason there was a vast amount of territory that drained into this creek when it was under the joint board of commissioners. I should judge about twenty thousand acres would naturally drain into this creek from Ottawa and Lucas.

Q. How much into Wolf creek?

A. The record shows there has been assessed in Wolf creek, 6,258 acres.

Q. Taking all this the drainage is all to the northeast?

A. Yes, sir.

Q. There is one more creek that drains into Crane creek known as —— creek about five miles long in Wood county?

A. This drains a portion of Ottawa county and discharges its waters through Crane creek—this creek I should judge would drain about three thousand acres of land.

Q. Taking all this land together, what, in your judgment would be a safe estimate as to the amount of land naturally drained through all these channels you have mentioned?

39 A. I think sixty thousand acres would be a safe estimate.

Q. There has been more than that assessed, has there not?

A. Well, I did not have time to look up the record thoroughly of Cedar creek. I think a safe estimate is sixty thousand acres.

Cross-examination.

By Mr. POTTER:

Q. Crake creek is the easterly boundary of these premises in controversy, is it not?

A. I don't know.

Q. Have you been down to the mouth of Crane creek?

A. I have never been down on the line so far as the waters of Cedar creek run.

Q. Do you know the length of Crane creek from the Wood County line to Lake Erie?

A. No, sir; I have only the statement of the engineer of Ottawa county.

Q. The Wolf creek you spoke of empties into Maumee bay about two miles west of these premises?

A. Somewheres along there.

Q. The drainage you speak of is into Crane creek and Wolf creek?

A. No, Crane creek and Cedar creek—they are two separate creeks.

Q. What you call Wolf Creek ditch enters Wolf creek how far from the marsh land?

A. That I can't say, I was not the engineer on that ditch. The water that comes down from this territory passes through these fractional sections bordering on the marsh and into Crane creek, Cedar creek and Wolf creek.

Mr. NILES (to the court): We offer in evidence a certified copy of the transactions of the land office on the claim of the State of Ohio for this land in controversy, certified January 26th, 1896, by S. W. Lamoreux of the General Land Office.

(Objection to the paper by Mr. Emery, objection overruled, exception.)

Noon adjournment.

Endorsement on testimony of Spofford: No. 1311. U. S. circuit court, northern district of Ohio, western division. The Cedar Point Club *vs.* Henry T. Niles *et al.* Testimony of Elmer L. Spofford, given before Hon. A. J. Ricks June 22, 1896.

40 B. C. U., Jr.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, E. M.
WASHINGTON, D. C., *January* 22, 1896.

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed copies of office letters of September 29, 1852 (with inclosure); October 5, 1852; January 23, 1872, and March 25, 1872, relating to the claim of the State of Ohio, under the swamp-land grant are true and literal exemplifications of the records in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. W. LAMOREUX,
[SEAL.] *Commissioner of the General Land Office.*

GENERAL LAND OFFICE, *September 29th*, 1852.

Register, Defiance, Ohio.

SIR: I herewith enclosed you a copy of list No. 2, of swamp and overflowed lands, selected within your district, under the act of 28th September, 1850, which has been rejected, for the reasons therein assigned.

You will please enter all the tracts embraced in this list, on your tract books as directed, in my letter of this date accompanying list

No. 1, with the exception of entering them "Approved; see list No. 1" you will say "Rejected; see list No. 2."

Very respectfully, your ob't serv't,

E. A. CABELL,
Acting Commissioner.

41 List No. 2, Defiance, Ohio. Rejected for the reasons assigned below.

SEPTEMBER 29, 1852.

Swamp lands.

Parts of sections.	Section.	Township.	Range.	Surveyed area.		Unsurveyed area.		Total area.	
				Acres.	*Hdths.*	*Acres.*	*Hdths.*	*Acres.*	*Hdths.*
South of the base line and east of the first meridian.									
¼ S. W. ¼ of S. W. ¼....	4	1 S.	1 E.	40	00	Sold in 1837.			
North of the base line and east of the first meridian.									
2—111 S. E. ¼..	3	4 N.	2 E.	160	00	Sold in 1836.			
* E. ½ of N. E. ¼..	23	"	"	80	00	W. & E. canal land.			
4—60 W. ½ of N. W. ¼..	24	2 "	4 "	80	00	M. & D. canal act 24 May, 1828.			
7—53 W. ½ of N. E. ¼..	17	2 "	7 "	80	00	Sold in 1828.			
Lot No. 1, or N. E. ¼ of 10—2734 N. E. ¼..	20	6 "	16 "	40	00	Sold in 1832.			
Big Spring reservation.									
N. ½ of N. E. ¼ & N. ½ Ad. 1—155 of N. W. ¼.. W. frl. part, & S. E. ¼ of Ad. 1—35 N. W. ¼.. N. W. ¼ of S. E. ¼..... Ad. 1—35.	25 30 30	1 N. 1 " 1 "	12 E. 13 " 13 "	160 117 40	00 44 00	To be sold for the benefit of Indians under treaty stipulation and not subject to selection as "swamp lands."			
Disputed territory north of the old State line.									
Deep. Vol. and page not given. } Marsh covered with wa..		9 S.	9 E.			2,500	00	Not swamp and not sold.	
} Same.....		9 S.	10 "			1,500	00		
} Same.....		10 "	10 "			2,000	00		
Total area rejected...				717	44	6,000	00	6,717	44
								80	
								6,797	44

* See letter to register, Jan. 10th, 1853.
P. D.

Endorsed on the back of the foregoing list is the following, to wit:
List No. 2. Swamp lands, Defiance, Ohio.
Rejected Sept. 29, '52.
Rejection registered October 8th, 1852. H. D.
Certified copy sent to governor of Ohio with letter 5th Oct., 1852. P. D.
Copy of this list sent to reg'r at Defiance, Ohio, with act'g com'r letter dated 29 Sept., 1852. P. D.

GENERAL LAND OFFICE, *October 5th*, 1852.

His excellency the governor of Ohio, Columbus, Ohio.

SIR: I have the honor herewith to inclose you a certified copy of list No. 2, of lands selected for the State of Ohio, within the Defiance

land district, as swamped and overflowed lands, enuring to said State under the provisions of the act of Congress, approved
42 September 28th, 1850, which has been rejected for the reasons therein assigned, under the head of "Remarks."

With great respect, your ob't serv't,

JOHN WILSON,
Commissioner.

"K." DEPARTMENT OF THE INTERIOR,
H. A. W. GENERAL LAND OFFICE,
E. K. WASHINGTON, D. C., *January 23d*, 1872.

Hon. John Sherman, U. S. Senate.

SIR: I have the honor to acknowledge the receipt by reference from you, of the communication from Ralph Leetes, Esq., of Ironton, Ohio, dated the 13th inst., relative to lands in the State of Ohio.

In reply to that portion of Mr. Leete's letter respecting swamp lands, I have to state that an examination of our records shows that in 1850, a list of lands were reported to this office as swamp selections enuring to the State of Ohio embracing 32,438.15 acres, of which 25,640.71 acres were patented to the State as swamp, February 19th, 1853, and the remaining 6,797.44 acres were rejected by this office Sept. 29, 1852, for reasons stated on list (copy herewith marked "A") and the State authorities so informed by letter same date.

In 1857, another list, embracing 21,999.99 acres was reported as swamp selections, but no action was had thereon with a view to patenting, as the tracts embraced therein were found to be alternate sections within the five-mile limits of canal grants, and it was decided by the Secretary of Interior Nov. 20, 1855, that such alternate sections did not enure to the State under the act of Sept. 28th, 1850, although they might be shown to be actually swamp and overflowed lands.

The remaining inquiries of Mr. Leete will be the subject of another letter.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

43 *"Copy of List 'A,' as Above Indicated."*

List No. 2, Defiance, Ohio. Rejected for the reasons assigned below.

Swamp lands. SEPTEMBER 29, 1852.

	Sec.	Twp.	R.	Surveyed area. Acres.	Hdths.	Remarks.
South of the base line and east of the first meridian.						
S. W. ¼ of S. W. ¼	4	1 S.	1 E.	40	00	Sold in 1837.
North of the base line and east of the first meridian.						
S. E. ¼	3	4 N.	2 E.	160	00	Sold in 1836.
*E. ½ of N. E. ¼	23	"	"	80	00	W. & E. canal land.
W. ½ of N. W. ¼	24	2 "	4 "	80	00	M. & D. canal act, 24 May, 1828.
W. ½ of N. E. ¼	17	2 "	7 "	80	00	Sold in 1828.
Lot No. 1, or N. E. ¼ of N. E. ¼	20	6 "	16 "	40	00	Sold in 1832.
Big Spring reservation.						
N. ½ of N. E. ¼, & N. ½ of N. W. ¼	25	1 N.	12 E.	160	00	To be sold for the benefit of Indians under treaty stipulations and not subject to selection as "swamp lands."
W. frl. part, & S. E. ¼ of N. W. ¼	30	1 "	13 "	117	44	
N. W. ¼ of S. E. ¼	30	1 "	13 "	40	00	
Disputed territory north of the old State line.						
						Unsurveyed area. / Total area.
Deep marsh covered with wa		9 S.	9 E.			2,500 00
Same		9 S.	10 "			1,500 00
Same		10 "	10 "			2,000 00
Total area rejected				717	44	6,000 00 / 6,717 44 / 80 / 6,797 44

*See letter to register, Jan. 10th, 1853. P. D.

K.
H. A. W.
E. K.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Mar.* 25, 1872.

Hon. C. Delano, Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt by reference from you, of the communication from Chas. I. Wetmore, Esq., of Columbus, Ohio, dated the 18th inst. relative to swamp lands in the State of Ohio. In reply I have to state that an examination of our records shows that swamp-land selections amounting to 54,438.14 acres, were reported to this office as enuring to the State of Ohio, under the act of Sept. 28, 1850, selected and disposed of as follows, viz:

44 In 1850 a list of lands was reported as swamp selections enuring to the State, embracing 32,438.15 acres, of which amount 25,640.71 acres were patented to the State as swamp lands Feb'y 19, 1853, and the remaining 6,797.44 acres were rejected by this office for reasons stated in our letter to the State authorities of date Sept. 29th, 1852.

In 1857, another list embracing 21,999.99 acres was reported as swamp-land selections, but no action was had thereon with a view to patenting as such, for the reason that the tracts embraced in said list, were found to be alternate sections, within the five-mile limits of canal grants, it having been decided by the Secretary of the Interior, by letter dated Nov. 20, 1855, that such alternate sections did not enure to the State under the swamp grant. The above embrace all the swamp-land selections, reported to this office as enuring to the State of Ohio, under the act of Sept. 28th, 1850, as shown by the records of this office.

Mr. Wetmore's letter is herewith returned.

I have the honor to be, very respectfully, your ob't s'v't,

WILLIS DRUMMOND,
Commissioner.

Endorsement on certified copies of letters, &c., from the General Land Office: No. 1311. U. S. circuit court, northern district of Ohio, western division. Cedar Point Club *vs.* Henry T. Niles *et al.* Certified copies of letters, &c., from General Land Office. Filed June 26, 1896. Irvin Belford, clerk.

EXHIBIT "G."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 2, 1878.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed printed circular is a true and literal exemplification of the circular in regard to the survey of the beds of meandered lakes, etc., issued by this office under date of July 13, 1874.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. W. MUMM,
[SEAL.] *Commissioner of General Land Office.*

45 *Circular.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 13, 1874.

As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated as defining the conditions under which such lake beds are regarded as surveyable, and as giving the proper mode of proceeding to have the same surveyed and to obtain title thereto:

The beds of lakes (not navigable) sloughed, and ponds over which the lines of the public surveys were not extended at the date of the

original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States; and whenever, by evaporation or the operation of any other cause, natural or artificial, the waters of such lake, slough, or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit in ordinary seasons, for agricultural purposes, such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain.

Such surveys will be ordered, and, upon approval, disposition proceeded with in the following cases:

1st. Where the waters have so far permanently receded or disappeared as to permit during the ordinary surveying season (not on the ice), the actual extension of the lines of survey, and the establishment and marking of corners in the manner required by law, over the whole area of the bed of such former lake.

2d. Where the waters have not generally disappeared, but where they have so far permanently receded as to leave a margin of dry land fit for cultivation between the original meandered lines and the remaining waters of sufficient area to admit of the survey and the establishment of at least three of the corners of a quarter section.

3d. The Commissioner of the General Land Office will consider the question of ordering a survey of margins not admitting the laying off of one hundred and sixty acres, but not less than forty acres.

Parties desiring the survey of such lands may make application in writing to the Commissioner of the General Land Office, therefor, stating the approximate area, and the situation of the
46 tract with reference to the section, township, and range of the public surveys, the same to be illustrated by a diagram; the fact that the waters have disappeared in the manner or to the extent as specified in one of the three several above-specified cases, such statement to be accompanied with the affidavit of at least two creditable and disinterested witnesses as to the disappearance of the waters, the probable quantity of land capable of being surveyed in the whole area lying between the original meandered line and the then margin of the waters, and showing what portion of such area is fit for agricultural purposes. To insure prompt attention and decision by this office, both the statement and affidavit required must be full and specific.

If, upon examination of such statement, diagram, and proof, it is found that such survey may be properly allowed, the parties applying will be so notified, and upon their designating to this office the name and residence of some competent and reliable surveyor, together with a statement from him in writing of the amount for which he is willing to execute the field-work of the survey, and a certificate of some United States depositary that the amount specified has been deposited to the credit of the United States "on account of individual depositors," the Commissioner will then issue the necessary instructions to the surveyor to enable him to execute the field-work of survey in accordance with the public land system.

To correct what seems to be a very general misapprehension as

to the manner in which persons may proceed to perfect title who have made actual settlement on lands of the character herein designated, and who claim or propose to claim, under the pre-emption laws of the United States, it is remarked that in no event and at no stage of the proceedings can their declaratory statements be received or filed in this office. Such declaratory statements must be filed in the local land office and cannot be there received until after such survey has been made and the approved plat thereof filed in the local office.

It is proper to further state that the fact of having borne the expense of survey will give no priority of claim or right, under existing laws, to purchase the land, or in any manner affect the vested interest of any party thereto, should such exist, as the land when surveyed, will be subject to disposal according to the laws of Congress and the regulations of this office relative to the disposal of lands embraced in fragmentary survey.

In case the lake bed is small and is so situated that no township, section or quarter-section corners will need to be established
47 by reason of such lake being situated within a given section or sections fully surveyed, no deposit will be required; and upon proof being furnished this office as above of the disappearance of the water, the premises will be platted, and the land can then be disposed of under existing laws.

Respectfully,

S. S. BURDETT,
Commissioner.

Endorsement on Exhibit "G:" No. 1311. U. S. circuit court, northern district of Ohio, western division. Cedar Point Club *vs.* Henry T. Niles *et al.* Copy of circular, "Exhibit G." Filed June 22, 1896. Irvin Belford, clerk.

Case Heard and Taken under Advisement.

June Term, A. D. 1896, to wit, June 22d, 1896.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311. Chancery.

This day came the parties by their attorneys and solicitors and thereupon this case came on to be heard upon the pleadings and evidence. And the court having heard the evidence and the argument of counsel continued said cause for further consideration.

Continuance.

June Term, A. D. 1896, to wit, November 5th, 1896.

Present: Honorable Augustus J. Ricks, U. S. district judge.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311. Chancery.

This cause is continued until the next term of this court.

48 *Leave to File Amendment to Bill of Complaint.*

December Term, A. D. 1896, to wit, January 15th, 1897.

Present: Honorable E. S. Hammond, U. S. district judge, sitting by designation.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311. Chancery.

This day came The Cedar Point Club, complainant in said above cause, by its solicitors Potter & Emery, and presented to the court for its allowance and filing an amendment to the original bill of complaint filed herein. And the court having considered the same, and the parties defendant by their solicitors consenting thereto, does now here approve of the same and permit and order the same to be filed herein, and said defendants severally waive all right and day wherein to plead to said amendment.

Amendment to Bill of Complaint.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Plaintiff,
vs.
HENRY T. NILES, GERTRUDE J. NILES, Frank Niles, Moses Burdo, and Black La Corse, Defendants. } No. 1311. In Equity.

Amendment to bill of complaint.

The said complainant still insisting and relying upon all and singular the several matters in and by its original bill set forth, averred and charged, by leave of court first obtained, makes and files this amendment to its said bill of complaint herein, and as and for and by way of such amendment thereto, saith:

The said complainant upon information and belief avers to be true all and singular the matters recited and set forth in and by items numbered two to eighteen, inclusive, of the agreed statement

of facts subscribed by the parties and filed herein, and by
49 reference adopts and makes the same a part hereof the same as if herein fully and at large set forth in the same words and figures.

Complainant herein further contends and avers that under and by virtue of the United States statutes in force in the years 1833 and 1834, providing for and governing the survey of the public land, the making of the survey as made by said Rice, the return of the field-notes, map and plat thereof by the surveyor general to the Commissioner of the General Land Office and his approval thereof, and the sale and patent of said fractional sections under and in pursuance of and as described in said survey and plat, constituted the said line bordering said fractional sections on the one side and said marsh upon the other, a boundary line of the lands so patented, and leaving in the United States Government the title to the lands designated as impassable marsh and water, while defendants herein contend that by virtue of said statutes and survey thereunder, the said line was and is in every respect and particular the ordinary meander line, ascertained and regarded solely for the purpose of ascertaining and evidencing area of land to be paid for and in no-wise defining the area or boundary of the fractional section or subdivision surveyed and patented.

Complainant further avers that the defendant Henry T. Niles is the husband of the answering defendant Gertrude J. Niles, and the others of said defendants were in the matters and acts in said bill complained of against them the agents, servants and tenants of said Gertrude J. Niles, and claim to justify their said acts solely under and by virtue of the supposed and claimed title and right of said Gertrude J. Niles.

That the nature and character of the said lands hath been and is such that the acts and doings thereon committed as complained of by and under authority of the said defendants, are not in the nature of continuous and exclusive possession and control, and thus if wrongful constituting the foundation of a single action or a small number of actions of trespass, but on the contrary consisting mainly of a vast number of occasional and casual acts producing inconsequential and inconsiderable damage, and if wrongful constituting foundation for a great number of actions at law, the prosecution and defense whereof would be greviously burdensome to all parties and interests herein. And the said defendants at the commencement of this suit threatened to continue the said occasional and casual invasions and uses of the said premises.

50 Wherefore the said complainant prays decree as in its original bill.

POTTER & EMERY,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Northern District of Ohio,
Western Division, Lucas County, } ss:

On the 8th day of January, A. D. 1897, before me personally appeared E. D. Potter, Jr., one of the attorneys for the complainant above named, who being by me duly affirmed, deposes and says that he is one of the attorneys for the Cedar Point Club, familiar with its business, and that he has read the foregoing amendment to bill of complaint and knows the contents thereof. That the same is true of his knowledge except as to the matters therein stated on information and belief and as to these matters he believes it to be true.

E. D. POTTER, JR.

Subscribed and sworn to before me this 8th day of January, A. D. 1897.

[SEAL.] J. W. LYONS,
Notary Public, Lucas County, Ohio.

Stipulation.

The defendants herein hereby assent to the filing of the within amendment and to the making of items two to eighteen inclusive, of the agreed statement of facts herein by reference a part of said amendment as in and by said amendment purported to be done; and do hereby admit to be true the matters set forth in and by said amendment and said items of said agreed statement of facts, and that the controversy between the parties herein is correctly stated in and by said amendment and deem it unnecessary to plead and therefore waive all right and day wherein to plead to said amendment.

Jan'y 8, 1897.

HENRY T. NILES,
FRANK C. DAUGHERTY,
Solicitors for Gertrude J. Niles, Defendant.

HENRY T. NILES,
Solicitor for Himself and All the Other Def'ts.

51 Endorsement on amendment to bill of complaint. No. 1311. U. S. circuit court, north. dist. of Ohio, west. div. The Cedar Point Club *vs.* Henry T. Niles *et al.* Amendment to bill of complaint. Filed Jan. 15, 1897. Irvin Belford, clerk. Potter & Emery, attorneys, Toledo, Ohio.

Continuance.

December Term, A. D. 1896, to wit, April 17th, 1897.

Present: Honorable Henry F. Severens, U. S. district judge. Sitting by designation.

THE CEDAR POINT CLUB
vs.
HENRY T. NILES ET AL. } No. 1311. Chancery.

This cause is continued until the next term of this court.

Decree.

June Term, A. D. 1897, to wit, June 12th, 1897.

Present: Honorable John M. Harlan, circuit justice.

THE CEDAR POINT CLUB, Complainant,
vs.
HENRY T. NILES, GERTRUDE J. NILES, FRANK Niles, Moses Burdo, and Black La Corse, Defendants.

No. 1311. Equity. Decree.

This day came The Cedar Point Club, party complainant, by its solicitors, Potter & Emery, and also the said defendants, Henry T. Niles, Gertrude J. Niles, Frank Niles, Moses Burdo and Black La Corse, by their solicitors F. C. Daugherty and Henry T. Niles. And thereupon this cause came on for hearing and was heard upon the complainant's original bill and amendment thereto, the answer of the defendant, Gertrude J. Niles, and the replication of the complainant, the pleadings, evidence and agreed statement of facts; and was argued by counsel.

And the court being now fully advised in the premises does find upon the issues joined in favor of said complainant and against said defendants; and further that all and singular the facts set forth in said complainant's bill and amendment thereto are true in substance and in fact and that it is in equity entitled to the relief prayed for therein.

52 The court further finds that at the time of bringing this action said complainant was in possession of all and singular the real property set forth and described in its said bill and that it had and has the legal estate in and was and is entitled to the possession of the same. That neither of said defendants nor any one of them have any estate in or are entitled to the possession of said real estate or any part thereof and that the plaintiff ought to have its title and possession quieted as against the said Gertrude J. Niles, her heirs, executors, administrators and assigns, as well as against each and every one of said defendants, as prayed for in complainant's said bill.

Wherefore it is ordered, adjudged and decreed that the title and possession of the said Cedar Point club, to all and singular the premises described in the bill, to which reference is here made for more particularity, be and the same is hereby quieted as against said defendants, Gertrude J. Niles, her heirs, executors, administrators and assigns, as well as against each and every of said defendants therein, and they all and singular are hereby forever enjoined from setting up any claim to said premises or any part thereof adverse to the title and possession of the said Cedar Point club, its successors or assigns, thereto. And the said defendants all and singular are hereby enjoined and restrained from any further violation of said complainant's rights and are perpetually enjoined and restrained together with their agents, servants, employés or assigns from fur-

ther entering upon said premises of said complainant or cutting hay therefrom, or ploughing the same, or herding or pasturing cattle thereon.

It is further ordered that the costs in this case, to be taxed be paid by the said defendant, Gertrude J. Niles and that execution issue therefor.

Thereupon came Gertrude J. Niles, party defendant herein by her solicitors, Henry T. Niles and Frank C. Dougherty and gave notice of her intention to appeal this cause to the circuit court of appeals, and it appearing that said Gertrude J. Niles is the only party defendant, who has filed answer to the bill of complainant, it is ordered this stand as an order of severance, with the right to said Gertrude J. Niles to appeal alone, without joining the other defendants therein.

And thereupon came the said Gertrude J. Niles and prayed an appeal to the United States circuit court of appeals for the sixth circuit, which is granted and the bond therefor is fixed at $250.

JOHN M. HARLAN,
Circuit Justice.

June 12th, 1897.

53

Petition on Appeal.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Complainant,
vs.
HENRY T. NILES, GERTRUDE NILES, ET AL., Defendants. } In Equity. No. 1311.

Petition on appeal.

The above-named Gertrude J. Niles conceiving herself aggrieved by the decree made and entered on the 12th day of June, 1897, in the above-entitled case, does hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and she prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals, for the sixth circuit.

HENRY T. NILES,
FRANK C. DAUGHERTY,
Solicitors for said Gertrude J. Niles.

Endorsement on petition for appeal: In the circuit court of the United States, northern district, western division of Ohio. The Cedar Point Club *vs.* Henry T. Niles *et al.* In equity. No. 1311. Petition on appeal. Filed July 8, 1897. Irvin Belford, clerk. Henry T. Niles & Frank C. Daugherty, solicitors for G. J. Niles.

Assignment of Errors on Appeal.

In the Circuit Court of the United States in and for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB, Complainant, *vs.* HENRY T. NILES, GERTRUDE J. NILES, ET AL., Defendants.	In Equity. No. 1311.

Assignment of error on appeal.

54 The said Gertrude J. Niles now comes and says that the decree in said cause is erroneous and against the just rights of her the said Gertrude J. Niles, for the following reasons:

That said decree is against the evidence of the case and the law applicable thereto.

That upon the evidence and the law applicable thereto the decree should have been in favor of the said Gertrude J. Niles and against the complainant.

FRANK C. DAUGHERTY &
HENRY T. NILES,
Solicitors for Gertrude J. Niles.

Endorsement on assignment of error: In the circuit court of the United States, northern district, western division of Ohio. The Cedar Point Club *vs.* Henry T. Niles *et al.* In equity. No. 1311. Assignment of error on appeal. Filed July 8, 1897. Irvin Belford, clerk. Henry T. Niles & Frank C. Daugherty, solicitors for G. J. Niles.

Order Allowing Appeal.

June Term, A. D. 1897, to wit, July 8th, 1897.

Present: Honorable E. S. Hammond, U. S. district judge. Sitting by designation.

THE CEDAR POINT CLUB *vs.* HENRY T. NILES and GERTRUDE J. NILES ET AL.	No. 1311. Chancery.

This day came Gertrude J. Niles and filed in this court her petition for appeal and her assignment of error on appeal to the circuit court of appeals of the sixth circuit.

On consideration whereof the said claim of appeal is hereby allowed on the said Gertrude J. Niles executing an undertaking according to law in the sum of two hundred and fifty dollars, with sureties to the acceptance of this court.

Undertaking on Appeal.

Know all men by these presents, that we, Gertrude J. Niles, as principal, and Henry T. Niles, as sure*ties* are held and firmly bound unto the complainant, The Cedar Point Club, in the full and just sum of two hundred and fifty ($250.00) dollars to be paid to
55 the said complainant, The Cedar Point Club, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a circuit court of the United States for the northern district of Ohio, in a suit depending in said court, between The Cedar Point Club, complainant, and Henry T. Niles, Gertrude J. Niles, *et al.*, defendants, a decree was rendered against the said Henry T. Niles, Gertrude J. Niles, *et al.*, and the said Gertrude J. Niles, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Cedar Point Club, citing and admonishing them to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden in the city of Cincinnati, in said circuit, on the 8th day of August next:

Now, the condition of the above obligation is such, that if the said Gertrude J. Niles, shall prosecute said appeal to effect and answer all damages and costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

GERTRUDE JAMES NILES.
HENRY T. NILES.

U. S. OF AMERICA,
Northern Dist. of Ohio, } *ss:*

Henry T. Niles, being sworn says he has property subject to execution over and above his debts and liabilities to the value of $500.00.

H. T. NILES.

Sworn to and subscribed before me July 9, 1897.

IRVIN BELFORD, *Clerk.*

Approved by E. S. Hammond, United States district judge, sitting by designation as circuit judge.

Endorsement on undertaking on appeal: The Cedar Point Club *vs.* Henry T. Niles *et al.* Undertaking on appeal. Filed July 9, 1897. Irvin Belford, clerk.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

56 DEPARTMENT OF THE INTERIOR, H. K.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y* 23, 1896.

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed photolithographs of the plats of survey of township 9 south, range 9 east; township 9 south, range 10 east, and township 10 south, range 10 east, Michigan meridian, surveyed by Ambrose Rice, and approved at Cincinnati, Sept. 30, 1835, are true and literal exemplifications of the official plats of the survey thereof on file in this office.

In testimony whereof, I have hereunto subscribed my name, caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

S. W. LAMOREUX,
[SEAL.] *Commissioner of the General Land Office.*

(Here follow plats marked p. 59, 60, & 61.)

Endorsed: No. 1311. U. S. circuit court, northern district of Ohio, western division. Cedar Point Club *vs.* Henry T. Niles *et al.* Photolithographs of the plats of survey, &c. Filed June 22, 1896. Irvin Belford, clerk.

DEPARTMENT OF THE INTERIOR, W. M. W.
GENERAL LAND OFFICE, O. H.
WASHINGTON, D. C., *April* 28, 1885. W. O. C.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed tracings of plats of the survey of certain portions of township 9 south, range 9 east, and townships 9 and 10 south, range 10 east, Michigan meridian, in the State of Ohio, made by John B. Marston, under instructions from the Commissioner of the General Land Office, dated April 2, 1881, are true and literal exemplifications of the official plats of said survey on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Wash-
57 ington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

(Here follow plats marked pp. 62 to 67, incl.)

Endorsed: No. 1311. U. S. circuit court, northern district of Ohio, western division. Cedar Point Club *vs.* Henry T. Niles *et al.* Tracings of plats of the survey, etc. Filed June 22, 1896. Irvin Belford, clerk.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CEDAR POINT CLUB
vs.
GERTRUDE J. NILES. } Equity. No. 1311.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the record, exhibits and all proceedings in the above case, and there is annexed to and transmitted therewith the citation issued therein.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court at Toledo, in said district, on this 3d day of August, A. D. 1897, and of the 122d year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk,*
[SEAL.] By J. W. WILSON,
Deputy Clerk.

THE UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

The United States Circuit Court of Appeals for the Sixth Circuit.

To the Cedar Point Club, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 8th day of August next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern
58 district of Ohio, wherein Gertrude J. Niles is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second.

E. S. HAMMOND,
United States District Judge, Sitting by Designation as Circuit Judge.

I hereby, this 10th day of July, 1897, accept due personal service of the foregoing citation on behalf of Gertrude J. Niles, appellant, and do hereby enter our appearance in said proceeding in appeal in the United States circuit court of appeals for the sixth circuit.

CEDAR POINT CLUB,
By POTTER & EMERY, *Its Att'ys.*

68 And afterwards, to wit, on August 9th, 1897, an appearance was filed in said court in said cause, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1896.

GERTRUDE J. NILES
v.
THE CEDAR POINT CLUB. } No. 541.

To the clerk of said court:

Please enter our appearance as counsel for the appellant in the above-entitled case.

HENRY T. NILES.
FRANK C. DAUGHERTY.

And afterwards, to wit, on October 27, 1897, an order was entered upon the journal of said court in said cause; which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GERTRUDE J. NILES
v.
THE CEDAR POINT CLUB. } Appeal from the Circuit Court of the United States for the Northern District of Ohio. Before Judges Taft, Lurton, and Severens.

69 This cause came on to be heard this day and was argued by Mr. Henry T. Niles for the appellant, and by Mr. Thomas Emery for appellee, and is submitted to the court for decree.

And afterwards, to wit, on February 8th, 1898, and opinion was rendered in said cause, which is in the words and figures as follows:

Opinion.

70 United States Circuit Court of Appeals, Sixth Circuit.

GERTRUDE J. NILES
vs.
THE CEDAR POINT CLUB. } No. 541. Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Submitted October 27, 1897; decided February 8, 1898.

Before Taft and Lurton, circuit judges, and Clark, district judge.

This bill was filed by the Cedar Point Club, an Ohio corporation, to restrain threatened continuous trespasses upon a large body of marshy land lying on the shore of Lake Erie and in Lucas county, Ohio. The complainant's title depends upon patents from the United States to H. M. Hanna and Phillip Lacourse issued in 1882, and mesne conveyances to complainant. Gertrude Jane Niles,

the appellant, who was defendant below, denied the title of complainant and claimed the same lands under eleven patents for fractional sections issued to Margaret Bailey in 1834, and under mesne conveyances to the said Gertrude J. Niles. Upon the pleadings and evidence there was a decree for the complainant and a perpetual injunction awarded. The correctness of that decree depends upon the true boundary of the patents to Margaret Bailey. Those patents were for fractional parts of sections and each was meandered on the southwestern margin of a marsh, having an area of some 4,900 acres, which lies between the meandered line of the Margaret Bailey patents and the open water of Lake Erie. If that meandered line following the margin of the swamp was intended as a boundary line, the decree must be affirmed, otherwise it must be reversed.

The further facts necessary to be stated appear in a stipulation upon which the case was heard below, and are these:

1. In 1834–1835, Ambrose Rice, a Government surveyor, surveyed and subdivided fractional township 9 south, in range 9 east,
71 and 9 and 10 south, in range 10 east, from the Michigan meridian, and duly certified his field-notes of such survey and subdivision to the then surveyor general, Robert T. Lytle. These townships are now in Lucas county, Ohio.

In making a survey of these three townships, sections 22, 25, 26, and 27, T. 9 S., range 9 east, and sections 30, 31, and 32, in T. 9 S., range 10 east, and sections 4, 9, 10, and 11, T. 10 S., range 10 E., were meandered on the southwestern margin of a marsh described on one plat as "a flag marsh," and on another plat as "impassable marsh or water." On the west of this marsh, Rice at the same time surveyed a narrow strip of sand separating this marsh from the open waters of Maumee bay, and on the northeast a like strip separating it from the open waters of Lake Erie. This strip commenced in section 22, T. 9, R. 9, and ended in section 11, T. 10, R. 10, and was divided by two openings into the lake, into what Rice called Cedar, Sandy, and Crain islands. This strip was meandered on the one side along the open waters of the bay and lake, and on the other side on this same "flag marsh" or "impassable marsh or water."

One of these plats, being that of subdivision of T. J. S., R. 9 E., is here set out as exhibiting, in a general way, a portion of the meandered line of the fractional sections, the boundaries of which are here involved:

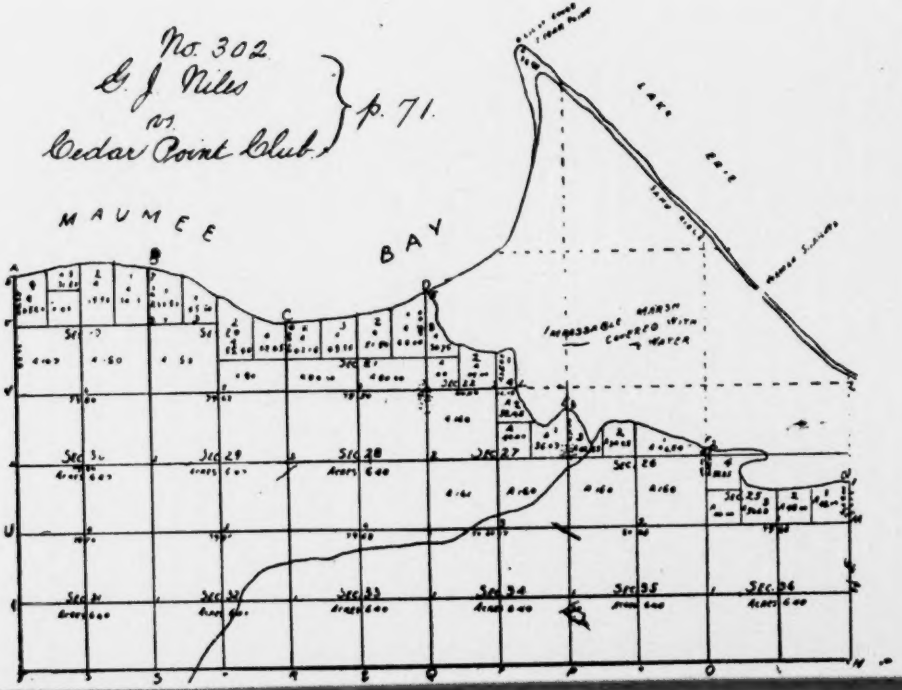
(Here follows diagram marked page 71.)

72 2. On the 10th of July, 1844, eleven patents were issued to Margaret Bailey for these eleven fractional sections above mentioned, that is, for 22, 25, 26, and 27, T. 9, R. 9, and 30, 31, 32, T. 9, R. 10, and 4, 9, 10, and 11, T. 10, R. 10, extending the entire length of this marsh, each patent specifying the number of acres contained between the section line and the meandered line as run by Rice.

3. The plats and marginal field-notes also show that the southerly

TOWNSHIP No. IX SOUTH RANGE No. IX EAST OF THE MICH. MER.

No. 302
G. J. Niles
as
Cedar Point Club
} p. 71.



edge of the "flag marsh," "impassable marsh and water," was surveyed and that the lines of the fractional sections southerly of the said marsh and water, were identical with the southerly edge of the marsh. The computed areas of the fractional sections and of their respective subdivisions, as shown upon the said plat, conformed to the area included within the said surveyed lines, and did not, nor any thereof, include any part of either marsh, water or islands. The several patents to Margaret Bailey are of the same date and each identical in form, except as to description. The description of the patent for section 11, T. 10, R. 10 E., is here set out as fairly typical of the form and description of all the rest. It is as follows:

"To all to whom these presents shall come, Greeting:

"Whereas, Margaret Bailey, of Champaign county, Ohio, has deposited in the General Land Office of the United States a certificate of the register of the land office at Bucyrus, whereby it appears that full payment has been made by the said Margaret Bailey according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of public land' for fractional section eleven (11), in township ten (10) south of the Michigan base line of range ten (10), in the district of land subject to sale at Bucyrus, Ohio, containing twenty (20) acres and forty-five hundredths of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey."

4. It appears from the official correspondence of the land office in evidence, that in 1850 the State of Ohio, under the swamp act of that year, demanded patents for 32,438 acres as swamp land. Patents were issued for all these lands except 6,797 acres, the claim to which was rejected upon the ground that it was not swamp land "and nearly all sold." Of the amount rejected, the greater part consisted of the lands marked "flag marsh," "impassable marsh and water" on the plats and in the field-notes of Ambrose Rice, being the lands now here in controversy.

5. On September 16, 1861, a patent was issued to Chester W. Norton for 34 acres and $\frac{89}{100}$ acres, being the land known as "Cedar point" on the plat of Ambrose Rice, east of Maumee bay in T. 9 S., R. 9 E. of the Michigan meridian. And on the 10th of October, 1876, a patent was issued to Arthur D. Howell for that portion of the sandy ridge shown on the plat of Ambrose Rice as Sandy island and Crain island, in section 24, T. 9, R. 9 E., and in sections 19, 29, 30, 32, and 33, in T. 9 S., R. 10 E., and in sections 2, 3, 4, and 11, in T. 10 S., R. 10 E. Michigan meridian, and containing in all 55 and $\frac{55}{100}$ acres, according to the official plat and survey of the said lands as returned to the surveyor general by said Ambrose Rice.

73

6. On the 13th of July, 1874, the General Land Office issued a circular letter concerning the circumstances under which the department would cause surveys to be made of lands theretofore

unsurveyed and platted because of the presence of water. Among other things stated in that circular letter, it was said:

"The beds of lakes (not navigable) sloughed, and ponds over which the lines of the public surveys were not extended at the date of the original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States; and whenever, by evaporation or the operation of any other cause, natural or artificial, the waters of such lake, slough or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit in ordinary seasons, for agricultural purposes, such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain."

In April and May, 1881, John B. Marston, a civil engineer residing in Lucas county, under the instructions from the Commissioner of the General Land Office of date April 2, 1881, surveyed and subdivided into sections the area which was as aforesaid in and upon the surveyor general's plat of Ambrose Rice's survey designated as "flag marsh" and "impassable marsh and water" in said town 9 south, range 9 east, and towns 9 and 10 south, range 10 east; and on May 28, 1881, duly certified his field-notes of said survey to the then Commissioner of the General Land office.

This survey was so made, and the area surveyed so subdivided into sections and parts of sections, as to complete and render full, to the extent that the area so then surveyed was in form suitable therefor, the sections which in said Rice's survey were rendered fractional by omission and exclusion from said survey of area designated as "flag marsh" and impassable marsh and water."

The boundary line on the westerly side of the area so surveyed by said Marston, from the point 2.75 chains easterly of the section line between sections 21 and 22, in town 9, range 9, extending somewhat east of north to the southerly extremity of the west part of Cedar island is the shore of Maumee bay; and the boundary line on the southerly and westerly sides of said survey, from the point 2.75 chains easterly of the said line between sections 21 and 22 extending southerly and easterly to the outlet of Crane creek, in section 11, town 10, range 10, is identical with the boundary
74 line between the surveyed lands and the "flag marsh" and "impassable marsh and water," as shown upon the said plat of the survey made by Ambrose Rice.

The land thus surveyed and subdivided by Marston was subsequently patented to H. M. Hanna and Phillip La Corse, from whom the appellee holds deeds conveying all the rights of the said patentees thereunder.

Concerning the character of the marshy land thus patented to Hanna and La Corse, the facts as stipulated by the parties in interest are these:

"16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from the

large bodies of land now in Ottawa, Wood and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein.

"17. The general character, description and condition of the said land surveyed by said Marston was by him correctly set forth under the title 'General description' in the field-notes of the said survey so as aforesaid by him certified to the Commissioner of the General Land Office.

"That concerning the portion of said survey in town 9 south, range 9 east, reciting, to wit:

"'The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it, particularly in the south and west part, are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which without any well-defined channel finds its way across the marsh to the lake. Again in heavy gales of wind it is subject to inundations from the lake, which upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded along the lake by a sand beach averaging 1 chain in width, and 3 feet in height.'

"That concerning the portion of said survey in town 9 south, range 10 east, reciting, to wit:

"'The surface of this fractional township is covered with a deep marsh of grass, canes or reed, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the twp. south. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the drainage from wood on the south and west, which spreads over the entire surface and without any positive channel finds its way to the lake.

"'Again the twp. is subject to inundations from the lake during heavy gales of wind which upon the termination of the gale, or a change in the direction of the wind, slowly finds its way back into the lake.

75 "'This fractional twp. is bounded on the northeast by Lake Erie, between the lake and the marsh proper is a sand beach, averaging 3 feet high and 1 chain in width, generally covered with bushes and small trees of oak, poplar, willow and cottonwood.'

"That concerning the portion of said survey in town 10 south, range 10 east, reciting, to wit:

"'The description for this township must necessarily be similar to that of the two preceding townships. The surface of that part of the twp. comprised in this survey is one large swampy marsh, land generally very wet and boggy. Its surface is covered with grass canes (or joint grass), wild rice, and such like marsh productions, reaching to a height of ten or more feet. Some parts, especially on sec. 10 & 11 can be pastured, but the larger portion is filled with bogs and pond holes, connected by narrow and tortuous channels.

"'It receives the drainage from the woods on the south and west

and is subject to inundations from the lake. On the prevalence of strong S. W. winds this water flows from the marsh into the lake, and upon the occurrence of N. E. winds the lake floods the marsh. The principal outlets and inlets are Crane creek and Ward's canal. This canal is an improvement made by C. B. Ward, of Detroit, Michigan, on sec. 4, and running across sec. 5 for the purpose of getting vessels and ship timber from his ship yard on sec. 5. It is built without locks and is really only a great ditch. Waterway 50 feet. Depth 7 feet. The buildings (or sheds) at the fishing stations 4 & 11 are the only other improvements.'

"A comparison of the survey made by Ambrose Rice in 1834 and 1835 with that made by John B. Marston in 1881 indicates that Sandy and Crane islands washed somewhat shoreward during the period intervening between the making of said respective surveys.

"18. By reason of unusual drouth which during the years 1893, 1894 and 1895 prevailed quite generally over the region of country from which Lake Erie and its tributaries derive their waters, including that the drainage whereof was to and through the premises in controversy, the major portion of the said premises was dry during the summer of 1895, except in case of heavy local rains or when the adjacent waters of Lake Erie were higher than they usually were during that summer."

LURTON, circuit judge, after making the foregoing statement of facts, delivered the opinion of the court:

By the provisions for the survey of public lands, now found in sections 2395 and 2396, Revised Statutes, it is required that such lands shall be surveyed into townships six miles square, and each in turn subdivided into 36 sections of a mile square, except where the line of an Indian reservation, or of tracts of land hereto-
76 fore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require. The patents to Margaret Bailey are for fractional sections. The boundary lines are not set out in the patents, but reference is made to the official plat of the survey of said lands for identification of the land granted, thereby adopting the plat as a part of the instrument.

Hardin v. *Jordan*, 140 U. S., 371–380.

When we refer to the plat and field-notes we find that all the lines of each fractional section are straight except the line bordering the swamp or marsh laid down upon one plat as "a flag marsh" and upon another as "impassable marsh and water." The straight lines of the sections are not continued into or across this marsh, but stop at the margin thereof. Beyond this marsh and adjoining the open waters of Lake Erie, there was a long, low and narrow sandy ridge, broken at points by shallow water channels. These small areas of dry land were separately conveyed and platted as additional fractional sections. Along the southwestern border or margin of this marsh the plat shows that a line was meandered, and the question

is, whether this line meandered along the water line of this marsh is the boundary line of the fractional sections bordered on said marsh.

In view of the form of title granted to Margaret Bailey, we are called upon to inquire and determine the effect of that title in reference to this flag marsh upon which her fractional sections meander. The long and undisputable practice of the Government has been to measure the price of public lands, when patented, by the quantity of upland granted and to require no payment for lands covered by the waters of streams or lakes. For the purpose of ascertaining the quantity of upland to be paid for, a line meandering the margin of such waters is run, and, where this is the purpose of running such a meandering line, it is not regarded as in any sense a boundary, but as only pointing out the sinuosities of the bank for the purpose of arriving at the area of land to be paid for.

Railroad Company v. Schumeir, 7 Wall., 272.
Hardin v. Jordan, 140 U. S., 371–380.
Horne v. Smith, 159 U. S., 40–43.

As we understand it, the contention of the appellant is, that this meander line following the southerly water line of the marsh was not run as a boundary line, and that if the marsh, under the evidence, was a part of Lake Erie, her boundary is the shore line of the lake proper, and if that shore line has receded, her boundary has followed the retreating shore, giving to her under the doctrine of reliction the land thus gained. On the other hand her contention is, that if the marsh was not a part of the lake, but was a mere pond,
marsh or other shallow non-navigable body of water, that
77 her boundary should be projected by extension of the side lines of each fractional section into said shallow pond or marsh, so as to complete each section as required by the law requiring the subdivision of each township into thirty-six sections of 640 acres each.

It has been long settled that Government grants for lands bordering upon navigable waters extend only to high-water mark. The title to the shore and to the lands under such water, is in the State within which such waters are situated as an incident of the sovereignty of the State, and are held by the State in trust for the public purposes of navigation. The United States has never had title to submerged lands under navigable waters, and its grants could not, therefore, be held as conveying them to their patentees.

John Pollard et al., Lessee, v. John Hagan et al., 3 How., 212.
McCready v. Virginia, 4 Otto, 394.
Weber v. Harbor Commissioners, 18 Wall., 57.
Hardin v. Jordan, 140 U. S., 371–380.
Scranton v. Wheeler, 16 U. S. A., 152.

It would therefore, follow that if this "flag marsh" shown on the plats of Ambrose Rice, was then a part of Lake Erie proper, the submerged lands would not be subject to grant by the United States, and that the title of the Cedar Point Club would fail, and this, with-

out regard to the goodness or badness of the title claimed under the doctrine of reliction by the appellant. But that marsh, under the stipulation as to the facts, cannot be regarded as a part of Lake Erie. The waters of that lake did not permanently submerge the lands described as "flag marsh" or "impassable marsh and water." In times of heavy gales the marsh was subject to temporary inundation, but otherwise the water, which stood or flowed over or through it, seems to have been the mere drainage from the higher lands adjoining, which found its way over these low lands to the lake. At the time of Rice's survey there was an unusual amount of water standing or flowing over the disputed land, and this may account for his failure to survey and plat it. When Marston made his survey in 1881, much of the marsh was dry enough for pasture purposes and much was capable of yielding harvests of coarse hay, and all or nearly all was covered with grass, wild rice, and other products of such swampy land. At a still later period it is shown that an even more favorable condition for pastoral purposes existed, due to unusual droughts occurring in 1893, 1894 and 1895. While under the stipulation as to the facts we must regard the condition of the marsh at the time of Rice's survey as exceptional, we have no such liberty in regard to its condition when Marston made his survey. We can, therefore, find no evidence of any such general and continuous lowering of the level of the water in the
78 lake, as would, by the doctrine of reliction, give to a riparian proprietor the land gained between an old and new shore line.

The decision of the supreme court of Ohio in *James v. Howells*, 41 Ohio St., 696, can have no effect as *res judicata*, because it was not a suit between the parties to this record. That was a controversy between James, a predecessor in title, to the appellant, and Howells, the patentee of one of the so-called sandy islands, shown on Rice's plat. James claimed then, as does his successor in title now, that the boundary of the Margaret Bailey patents was the open water of the lake, which would thus include Howells' island. Howells' defense seems to have been, first, that this marsh was a part of the lake proper, and that his patent was for an island separated from the shore of this lake by this marsh; second, that the meander line run by Rice on the border of this marsh *was run as a boundary line*, and, therefore, the grants to her could not, under any circumstances, convey land not within her boundaries. The case was decided for Howells upon both grounds. So far as it was a judgment upon facts, it is of no force or effect upon a different record and between different parties. The conclusion of that court upon the evidence relating to the character of this marsh was thus stated by the court:

"The contributions of such streams, mingled with other water of the lake, fill the straits between Cedar, Sandy and Crane islands, and the space platted as 'impassable water and marsh.' Even at low water in the lake, there is six inches of water in this marsh. Witnesses speak of a chain of ponds. These are merely spots in the marsh where, because of the depth, or for some other reason, vegetation has not been able to find support. The water is under the

vegetation that covers the so-called marsh, as well as the so-called ponds. The islands are in fact surrounded by water, although vegetation of a certain sort grows thickly in much of that water. The meandered line along the southerly edge of the so called marsh, was in fact along a shore of the lake. In order to form a statutory boundary, the navigable river need not be actually navigable at every point. Lake Erie as a whole is navigable. For that reason every part of its shore, under the act, might be treated by the surveyor as a legal boundary for fractional townships and sections. In so treating so much of the lake as lay behind these islands, Rice and Lytle did not exceed their authority. According to the evidence put in by James, as well as by Howell, it appears that even at a low stage of the lake there is six inches depth of water in this marsh, and a greater depth in the straits."

But the question as to whether this marsh was a part of Lake Erie and therefore a proper boundary for public lands, bordering thereon, is a question of fact, to be determined in this case upon the evidence in the record. There is no evidence in this record that the land in controversy "is land continuously submerged under not less than six inches of water in seasons when the water was
79 lowest," such as was found in the Ohio case. No such state of facts is shown in this record, and by no stretch of imagination could any court upon this record conclude that this low, swampy body of land, partly boggy, partly dry and sometimes subject to temporary inundation, was so continuously under the water of the great lake as to be a part thereof. We, therefore, reach the conclusion that this marsh was no part of Lake Erie when Rice made his survey in 1833–1834, and that if same was not included within the patents to Margaret Bailey for the fractional sections bordering thereon, it continued to be a part of the public lands subject to survey and patent. That a water line existed along the course of the meandered line run by Rice cannot perhaps be collaterally questioned. But the question is, whether that water line was the line of this marsh then having an unusual amount of water collected therein, or the water line of the lake proper? That the meandered line followed the sinuosities of the marsh and not of the lake is most evident from the facts of this case. The area of the fractional sections is given, and it is stipulated that no part of the area of the marsh or sandy islands was included in the survey under which Margaret Bailey's patents issued. It is also evident that no part of the marsh was surveyed at all. It is thus most manifest that this meandered line was run as a boundary and not merely for the purpose of ascertaining the quantity of dry land paid for.

It would be useless to speculate as to the reason which induced Rice to make the border of this marsh a boundary of the fractional sections bordering thereon. That he did so, there can be no doubt. Margaret Bailey paid only for the area of the lands actually included in the fractional sections, and accepted patents in which the meandered line along this marsh was made a boundary. She and her successors in the title are estopped to deny that the line of that

marsh was a proper line for a boundary. The patents conveyed only the land which was surveyed.

The case is governed by that of *Horne v. Smith*, decided in 1894, and reported in 159 U. S., page 40, *et seq.* That case involved the true boundary of three patents for fractional sections of public lands in Florida. The patents adopted the official plat of survey for identification of the lots granted. That plat showed that these lots were fractional sections bordering on Indian river. All the lines of the patents were the usual straight lines with the exception of a line meandering a water line marked on the plat as "Indian river." The facts as to this line as stated in the opinion of the court, were these:

"Along the course of this meander line, as shown on the plat, runs, according to the testimony, a bayou or savannah opening into the Indian river, and west of this bayou, and between it and the main waters of the river, is a body of land extending a distance of a mile or a mile and a quarter, and amounting to some 600 80 acres. This is a body of law land, in some places however from four to six feet above the level of the river, and covered with a growth of live-oak trees, many of them three and four feet in diameter. It was not land formed by accretions since the survey."

The contention was that this meandered line was not run as a boundary, but merely to ascertain the quantity of upland to be paid for and that the patents granted the lands between that line and Indian river, which was in fact more than a mile away. The land lying between this meandered line and Indian river was not in fact surveyed. In the course of its opinion the court said:

"But the question in this case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident from these facts. In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

"These considerations are conclusive that the water line which was surveyed and made the boundary line of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and

between it and the main body of the Indian river. It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but whatever the reason, the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou. * * *

"Although it was surveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

In conclusion, the court said:

"So, in the case before us, obviously the surveyors sur-
81 veyed only to this bayou, and called that the river. The plaintiff has no right to challenge the correctness of their action, or claim that the bayou was not Indian river or a proper water line upon which to bound the lots."

The conclusion we reach is, that the meandered line was the boundary line of the Margaret Bailey patents, and that the marsh was public lands subject to survey and patent, and that appellees obtained the title under the patents to Hanna and La Corse.

This conclusion affirms the opinion of Justice Harlan, who heard this case below, and who, in a memorandum opinion, said:

"My opinion is that the plaintiff is entitled to the relief asked in the bill. My conclusion rests upon the general ground that while a meander line is ordinarily to be taken as showing only the quantity of land to be paid for by the purchaser, the meander line in this case must be taken as a line of boundary. I do not think that there was any intention, by the survey and patents under which the principal defendant claims, to pass the title to the marsh land between the 'meander' line and the islands. On the contrary, it must be taken that the intention was not to pass the title to that land. I concur entirely with what was said in *James v. Howell*, 41 Ohio St., 696. And that case is supported in principle by *Horne v. Smith*, 159 U. S., 40."

The decree is in all things affirmed.

82 And afterwards, on the same day, to wit, on February 8, 1898, a decree was rendered in said cause; which decree is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

GERTRUDE J. NILES *v.* THE CEDAR POINT CLUB.	Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

And afterwards, to wit, on May 2nd, 1898, a petition for appeal was filed in said court in said cause; which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

GERTRUDE J. NILES, Appellant,
v.
THE CEDAR POINT CLUB, Appellee. } No. 541. Petition on Appeal.

The above-named Gertrude J. Niles, conceiving herself aggrieved by the decree made and entered on the 8th day of
83 February, 1898, in the above-entitled case, does hereby appeal from the said order and decree of the United States circuit court of appeals, sixth circuit, to the Supreme Court of the United States, for the reasons specified in the assignments of error which are filed herewith; and she prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY T. NILES,
FRANK C. DAUGHERTY,
Solicitors for said Gertrude J. Niles.

And afterwards, on the same day, to wit, on May 2nd, 1898, assignments of error were filed in said court in said cause, which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GERTRUDE J. NILES, Appellant,
v.
THE CEDAR POINT CLUB, Appellee. } No. 541. Assignments of Error on Appeal.

The said Gertrude J. Niles now comes and says—

That the decree in said cause is erroneous and against the just rights of her, the said Gertrude J. Niles, for the following reasons:

That said decree is against the evidence of the case and the law applicable thereto.

That upon the evidence and the law applicable thereto the
84 decree should have been in favor of the said Gertrude J. Niles and against the said The Cedar Point Club.

HENRY T. NILES,
FRANK C. DAUGHERTY,
Solicitors for said Gertrude J. Niles.

And afterwards, on the same day, to wit, on May 2nd, 1898, a bond on appeal was filed in said court in said cause; which bond is in the words and figures as follows:

Know all men by these presents that we, Henry T. Niles, as principal, and Frank C. Daugherty, as surety, are held and firmly bound unto the Cedar Point Club in the full and just sum of two hundred and fifty dollars, to be paid to the said The Cedar Point Club, its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, o-r heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the United States circuit court of appeals for the sixth circuit, in a suit depending in said court between Gertrude J. Niles, appellant, and The Cedar Point Club, appellee, a decree was rendered against the said Gertrude J. Niles, and the said Gertrude J. Niles having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Cedar Point Club, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the — day of —— next:

85 Now, the condition of the above obligation is such that if the said Gertrude J. Niles shall prosecute her appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

HENRY T. NILES.
FRANK C. DAUGHERTY.

Approved by—
WM. H. TAFT,
Circuit Judge and ex Officio Presiding Judge in Circuit Court of Appeals in the Above Cause.

And afterwards, on the same day, to wit, on May 2nd, 1898, an order allowing appeal was entered upon the journal of said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

GERTRUDE J. NILES, Appellant, *v.* THE CEDAR POINT CLUB, Appellee. } No. 541. Order Allowing Appeal.

This day came said Gertrude J. Niles and filed in this court her petition for appeal and her assignments of error on appeal to the Supreme Court of the United States.

On consideration whereof the said claim of appeal is hereby allowed on the said Gertrude J. Niles executing and undertaking, according to law, in the sum of two hundred and fifty dollars, with sureties to the acceptance of this court.

WM. H. TAFT,
Circuit Judge and ex Officio Presiding Judge of U. S. Court of Appeals, Sixth Circuit, in Above Cause.

86 United States Circuit Court of Appeals, Sixth Circuit.

GERTRUDE J. NILES, Appellant,
vs.
THE CEDAR POINT CLUB, Appellee.
} No. 541. Citation.

To the Cedar Point Club, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden in the city of Washington, on the 2nd day of June, 1898, next, pursuant to an appeal filed in the clerk's office of the circuit court of appeals of the United States, sixth circuit, wherein Gertrude J. Niles is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

WM. H. TAFT,
Circuit Judge & ex Officio Presiding Judge of U. S. Court of Appeals, 6th Circuit, in Above Cause.

87 I hereby, this 3rd day of May, 1898, accept due personal service of the foregoing citation on behalf of Gertrude J. Niles, appellant, and do hereby enter our appearance in said proceeding in appeal in the Supreme Court of the United States.

CEDAR POINT CLUB,
By POTTER & EMERY.

88 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record and the original citation in the case of Gertrude J. Niles *vs.* Cedar Point Club, No. 541, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this tenth day of May, 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: Case No. 16,883. U. S. C. C. of appeals, sixth circuit. Term No., 302. Gertrude J. Niles, appellant, *vs.* Cedar Point Club. Filed May 21st, 1898.

No. 302. 80

Brf. of Niles for Appellant

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Clerk

Filed Nov. 17, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 302.

GERTRUDE JAMES NILES, APPELLANT,

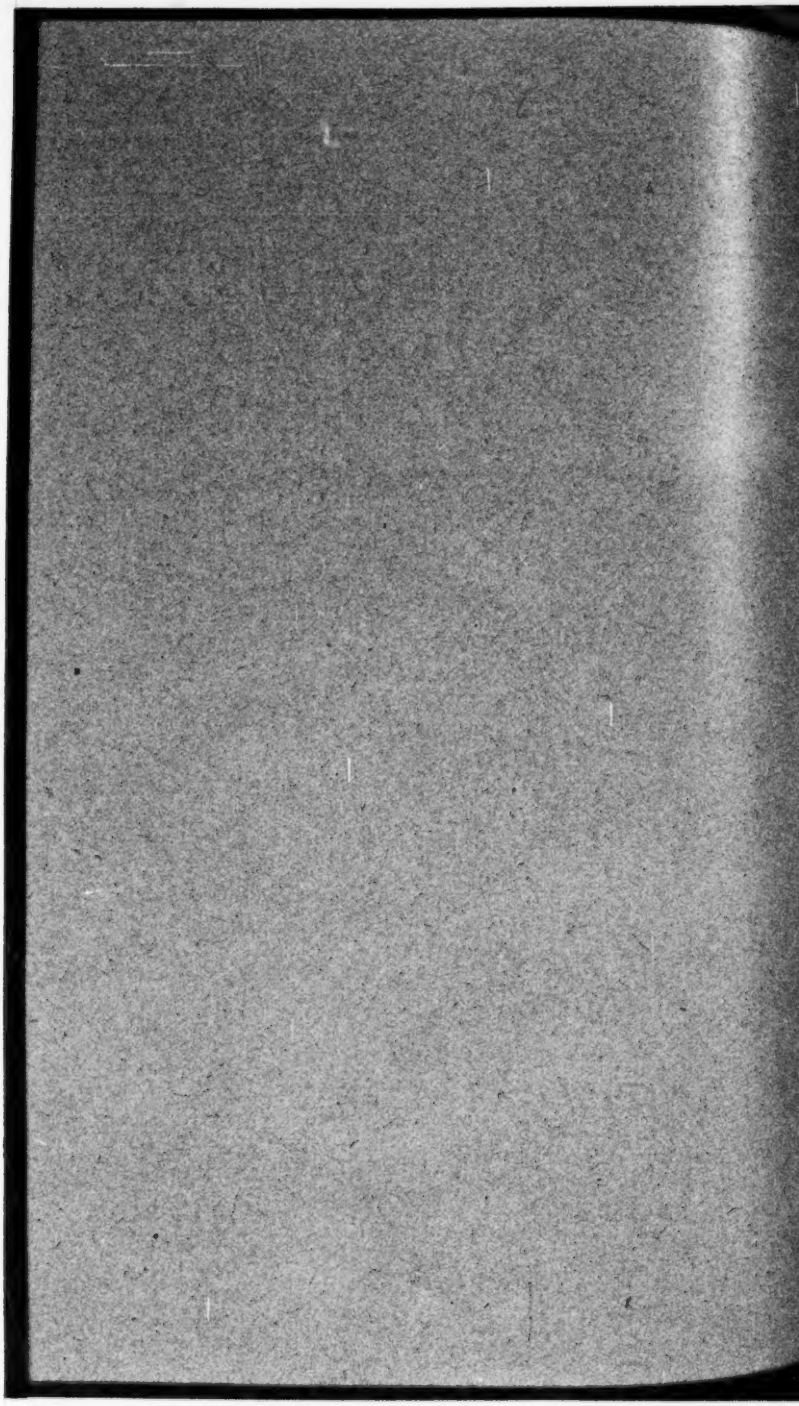
vs.

CEDAR POINT CLUB.

BRIEF FOR APPELLANT.

HENRY T. NILES
AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

The B. F. Wade Co., Printers, Toledo, O.



THE FACTS.

The facts in this case are simple and are all given in the agreed statement except what are shown by the Rice field notes and plats and official correspondence of the land office given in evidence and set out in the Record only one witness being called to make more definite a single point in the agreed statement.

I.

The material facts are these: In 1834 and 1835 Ambrose Rice, under employment of Robert Lytle, surveyor general of Ohio, surveyed and subdivided township 9, range 9, township 9, range 10 and township 10, range 10, all now in Lucas county, Ohio. In making this survey Rice meandered sections 19, 20, 21, and a little of 22, township 9, range 9, on the south shore of Maumee bay and the ballance of section 22 and sections 27, 26 and 25, township 9, range 9, and sections 30, 31 and 32, township 9, range 10 and sections 4, 9, 10 and 11, township 10, range 10 on the southwest margin of a body of water which he sometimes calls "the great marsh," sometimes "the drowned marsh" and sometimes "the inundated marsh of Lake Erie" and which is designated on the plats as "impassable marsh covered by water." Whether this marsh was a mere shallow extension of Maumee bay, as seems to us certain, and therefore part of Lake Erie, or a widening of the streams draining the upland into a continuous shallow lake or pond, Rice's notes embraced in the agreed statement leave no doubt that it was all so covered with water that it could not be surveyed.

In running this meander line Mr. Rice strictly followed the instructions in the present manual of instructions to deputy surveyors, approved by the land office in 1894, showing to a demonstration that he was acting under instructions substantially the same. These instructions as found on page 56 of Manual of Surveying Instructions, are as follows:

"At every point where either standard, township or section lines intersect—the bank of a navigable stream or any *meanderable line* corners will be established at the time of running these lines. Such corners are called meander corners and the deputy will commence at one of these corners, follow the bank or *boundary line*, and measure the length of each course from the beginning corner to the next "meander corner." In exact accordance with these instructions Rice ran each section and township line to this "impassable marsh covered

with water" and set a stake in or near its border. Then after m dering Maumee Bay three miles he starts from a meander corner where the line between sections 21 and 22 strikes the bay and foll the shore of the open bay for two chains and then follows the ma of this "impassable marsh covered with water," from meander co to corner through the three townships until it ends in the "inund marsh of Lake Erie," measuring each course as required with one ception. In section 26, township 9, range 9, he came to wha known in this record as Wolf Creek. This was in the languag the manual of instructions, page 56, a "shallow stream without well defined channel or permanent banks" which the deputy is "will not be meandered."

This stream he crossed and commenced on the other side, lea a gap of 20 chains (80 rods) in the meander line of section 26, w was not measured so that this line does not close by 80 rods.

This "impassable marsh covered with water" was separated the northeast from the open water of Lake Erie and for a short tance next the lake from the open waters of Maumee Bay by a nar strip of land, which Rice at the same time meandered on one sid the open waters of lake and bay and on the other side on this passable marsh covered by water."

This strip is divided by two narrow openings into what Rice c and the plat shows, as Cedar, Sandy and Crane Islands.

II.

Robert Lytle, the surveyor general, with the exact knowledg these premises given him by Rice's careful survey, made plats of three townships by which the eleven fractional sections on the so west of this marsh and the three islands separating it from lake bay, were sold and which by reference are made part of each of th patents given for them.

The laws of Ohio authorize copies of all government plats t recorded in the office of the surveyor of the county in which the is situated and give certified copies from this record the same forc evidence in all courts as certified copies from the land office.

Under this authority the Appellee, the Cedar Point Club, off at the trial plats of the three townships above named, duly cert as copies from the record in the county surveyor's office, and the pellant offered copies of the same townships which are certifie photo-lithographs and true and literal exemplifications of the off plats of the survey thereof on file in this office."

The plats offered by the Appellant are numbered 59, 60 and and the plats offered by the Appellee are numbered as 65, 66 and in the printed record and are inserted between pages 46 and 47, of record.

These plats substantially agree. There are four differences h ever, two of which are easily reconciled, but the other two are n significant and show that the plats from which the copies offered by Appellee were made had been changed by the government author to conform to a state of things occurring after the original plats made. The first of these differences is that the line of junctio

this "impassable marsh covered with water" with the open water of Maumee bay on plat 59, is shown by a light dotted line while on plat 65 it is a continuous black line, evidently the act of a lazy copiest.

On each of the plats 65, 66 and 67 the marsh is marked as "impassable marsh covered by water," while on plats 59, 60 and 61 this designation is on the middle plat only. But as the three townships were surveyed together and platted together it is not remarkable that this description appears only on the middle plat.

Rice's notes show that this designation was as appropriate to one as the others and was appropriate to all of them.

The third difference is much more material and shows beyond question that the government itself had changed the plats before these copies were taken to make them conform to a change, this record shows took place after the Rice survey.

It is agreed that between the time of the Rice survey in 1834-35 and the Marston survey hereafter spoken of in 1881, that Sandy and Crane Islands had been washed inshore. A comparsion of the quantities of land found by Marston in 1881 and the quantity at the time of the Rice survey shows that these islands must have washed in some 90 rods. While the plats offered by the Appellant show Cedar, Sandy and Crane islands extending the whole distance throughout the three townships with a width of 8 or 10 rods and containing over 110 acres; on the plats offered by the Appellee the quantity is omitted and the whole distance isma rked "sand ridge," and through one township this is marked by a simple black line showing that the islands had been practically swept away.

The fourth difference which shows to a demonstration that Lytle's plats had been acted upon by the government itself is that Cedar Point is marked as reserved for a light house, which could only have been done by the government.

III.

Patents for the eleven fractional sections bordering on this "impassable marsh covered by water" were issued on the 10th of July, 1844, to Margaret Bailey, that is for sections 22, 27, 26 and 25, township 9, range 9, and sections 30, 31 and 32, township 9, range 10, and sections 4, 9, 10 and 11, township 10, range 10.

It is agreed that the Appellant, Gertrude J. Niles, holds by mesne conveyances all the rights conveyed to Margaret Bailey by these eleven patents.

Patents were issued to Chester W. Norton, Oct. 16, 1861, and to Arthur D. Howells Oct. 10, 1876, for Cedar, Sandy and Crane islands.

The patent for fractional section 27, township 9, range 9 is as follows, omitting parts common to all patents: "For fractional section twenty-seven (27), in township nine (9), south of the Michigan base line of range nine (9) in the district of land subject to sale at Bucyrus, containing five-hundred and eighty-eight (588) acres and fifty-eight hundredths of an acre, according to the official plat of the survey of said lands as returned to the general land office by the Surveyor General."

The others are precisely like it except section, township, number of acres, etc.

IV.

From the official correspondence of the land office offered in evidence and given in the printed record commencing on the bottom of page 33, it appears that in 1850 the State of Ohio, under the swamp land act of that year demanded the whole of this marsh in the three townships as swamp land.

The land demanded is described as follows:

Deep marsh covered with water,	- -	9 S 9 E	2,500 acres.
" " " " "	- -	9 S 10 E	1,500 "
" " " " "	- -	10 S 10 E	2,000 "
			6,000 acres.

The State claim was rejected in these words: "Not swamp and nearly all sold."

This rejection on this ground was persisted in for 20 years up to July 29, 1872, as appears by the letter to Hon. John Sherman of that date, on page 35 of the Record.

It will be noted that at the time of this rejection nothing had been sold in anyway connected with this land except what was conveyed by the eleven Bailey patents.

We have given these facts with a good deal of fullness, because we think the errors complained of resulted from a failure of the court below to get a clear idea of them.

V.

During the months of April and May, 1881, John B. Marston, under appointment of the land office under a then recent ruling shown in a circular given in the Record, page 38, surveyed and subdivided this whole marsh shown on the plats, taking as his southwestern boundary the meander line run by Rice through the eleven Bailey fractional sections and on the other sides the open water of Maumee Bay and Lake Erie, for some reason not apparent, entirely disregarding the Rice survey of Cedar, Sandy and Crane Islands, and the patents issued for them to Norton and Howells.

In making this survey Marston first extended the lines of the eleven Bailey fractional sections precisely as the act of 1805 required until they met or struck the open water of the lake or bay.

The irregular portions of these sections between the meander line as run by Rice and the section lines so extended, Marston subdivided into 59 parcels containing according to the amounts given in the patents for them 2,952.87 acres, 28 of which have an irregular zigzag boundary on the southwest, leaving the balance of these fractional sections with a like zigzag boundary on the northeast.

The character of this newly discovered boundary line is shown by the plats of the Marston survey, offered by Appellee, and marked 62, 63 and 64 among the plats, between pages 46 and 47 of the Record.

It is safe to say that such a line so impossible to observe and maintain running eleven miles in every direction, and in no direction long with such sudden turns and such acute angles, without a mark

in the whole line, or a natural object of any kind to use as a mark, was never before seriously contended for as a boundary to stand for all time. Certainly not as an outbirth of the simplest land system ever devised, simpler even than the old Roman system, recognizing nothing but north and south and east and west lines and natural boundaries, except older boundaries.

The portions of the marsh outside of the Bailey fractions so extended Marston divided into 26 parcels containing 1,747.13 acres.

It is agreed that patents were issued for 94 of these 95 parcels to H. Melville Hanna and for one to Phillip La Corse, and that the Appellee, the Cedar Point Club, has all the rights conveyed by these 95 patents.

It appears from Marston's statement returned to the land office, which is adopted as part of the agreed statement, and from the Marston plats offered in evidence that at the time of his survey in 1881, no water stood permanently on these premises except in pond holes or as the Court below finds from Marston's statement that it was "a body of low, swampy land, partly boggy, partly dry," though sometimes subject to temporary inundations from northeast winds. See paragraph 17 agreed statement, page 29 Record.

It is also agreed (paragraph 18, page 30 Record) that at the time of the commencement of this suit Dec. 18, 1895, and for two or three years previous the premises were practically dry.

It is also agreed that the water in the lake was somewhat above its usual level at the time of Rice's survey.

These are all the material facts in the case as we think fairly stated. Under these facts the Cedar Point Club makes this claim in its amended bill given on page 41 of the Record.

That the meander line run by Rice through the eleven fractional sections was a boundary line of the lands patented to Margaret Bailey "leaving in the United States Government the title to the lands designated as 'impassable marsh and water'" outside of the meandered line.

The decree of the Court below sustains this claim to its fullest extent.

The Court say: "If the meander line following the margin of this swamp was intended as a boundary line the decree below must be affirmed, otherwise it must be set aside."

THE ARGUMENT.

We hold that the decree was clearly erroneous, and we submit these propositions for the consideration of the Court.

I.

We hold that the Court clearly erred in holding that the meander line run through the eleven Bailey fractional sections formed eleven exceptions to the admitted rule that "the meander line is not run as a line of boundary."

II.

We hold that the Court clearly erred in holding from the evidence disclosed in this record that the premises in controversy were not part of Lake Erie at the time of Rice's survey as found by the Supreme Court of Ohio, in James vs. Howells, 41, O. S. 696.

The Court below admits that if at the time of Rice's survey the premises in controversy were part of Lake Erie, they never belonged to the United States but to the State of Ohio, and that "the title of the Cedar Point Club would fail without regard to the goodness or badness of the title claimed under the doctrine of reliction by the Appellant," and this is undoubtedly sound law.

III.

If the premises in controversy were not part of Lake Erie, but a shallow lake or pond, the result would be the same as to the title of the Cedar Point Club, as this Court in Harden vs. Jordan, 140 U. S. 381, middle of the page says: "It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees."

If these premises were not part of Lake Erie they certainly were a shallow lake or pond, and the land under it would belong to the State or to the reparian proprieties as the State might decide.

IV.

If, however, the premises in controversy were neither part of Lake Erie or a lake or pond but anything like what they are described in the opinion of the Court below, "a body of low, swampy land, partly boggy, partly dry," then this case would come under the case of Whitney vs. Detroit Lumber Co., 78 U. S., 240, approved by this Court in Horne vs. Smith, 159 U. S., 45, and there being no water line to limit the grants, they would be limited by the line of the section granted in the patents extended as Marston extended them.

I.

The first proposition we submit is that

THE MEANDER LINE IS NOT A BOUNDARY LINE.

The Court below give this statement of the rule as to the meander line.

"For the purpose of ascertaining the quantity of upland to be paid for, a line meandering the line of such waters is run and *where this is the purpose of running such a line* it is not regarded as a boundary, but as only pointing out the sinuosities of the bank, and for the purpose of arriving at the quantity of land to be paid for."

And these authorities are quoted to authorize this statement:

Rail Road Company vs. Shurmeir, 7 w. 272; Harden vs. Jordan, 140 U. S., 371; Horne vs. Smith, 159 U. S., 41.

In this connection we will call the attention of the Court to the plats offered by the Appellee, itself before referred to being the three last plats, marked 65, 66 and 67, found in the record between pages 46 and 47, on which the Bailey fractional sections were sold and which by reference are made part of her patents.

Let us examine this statement of the rule as to the meander line, which clearly implies that it is sometimes run as a boundary to stand for all time, as the Court held the Rice line was in connection with the plats offered by the Cedar Point Club and the authorities cited.

In Rail Road Co. vs. Shurmeir, 7 W., 272, Judge Clifford speaking for the Court says: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries of the tract* but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

But to leave no possible question he adds:

"In preparing the plat from the field notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course and not the meander line is the boundary."

This language of Judge Clifford is quoted with approval by this Court in another of the cases referred to by the Court below, Harden vs. Jordan, 140 U. S. 381.

The Court in this case further says:

"It has been the practice of the Government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity of upland granted, no charge being made for the land under the bed of the stream or *other body of water*. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the quantity of upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines."

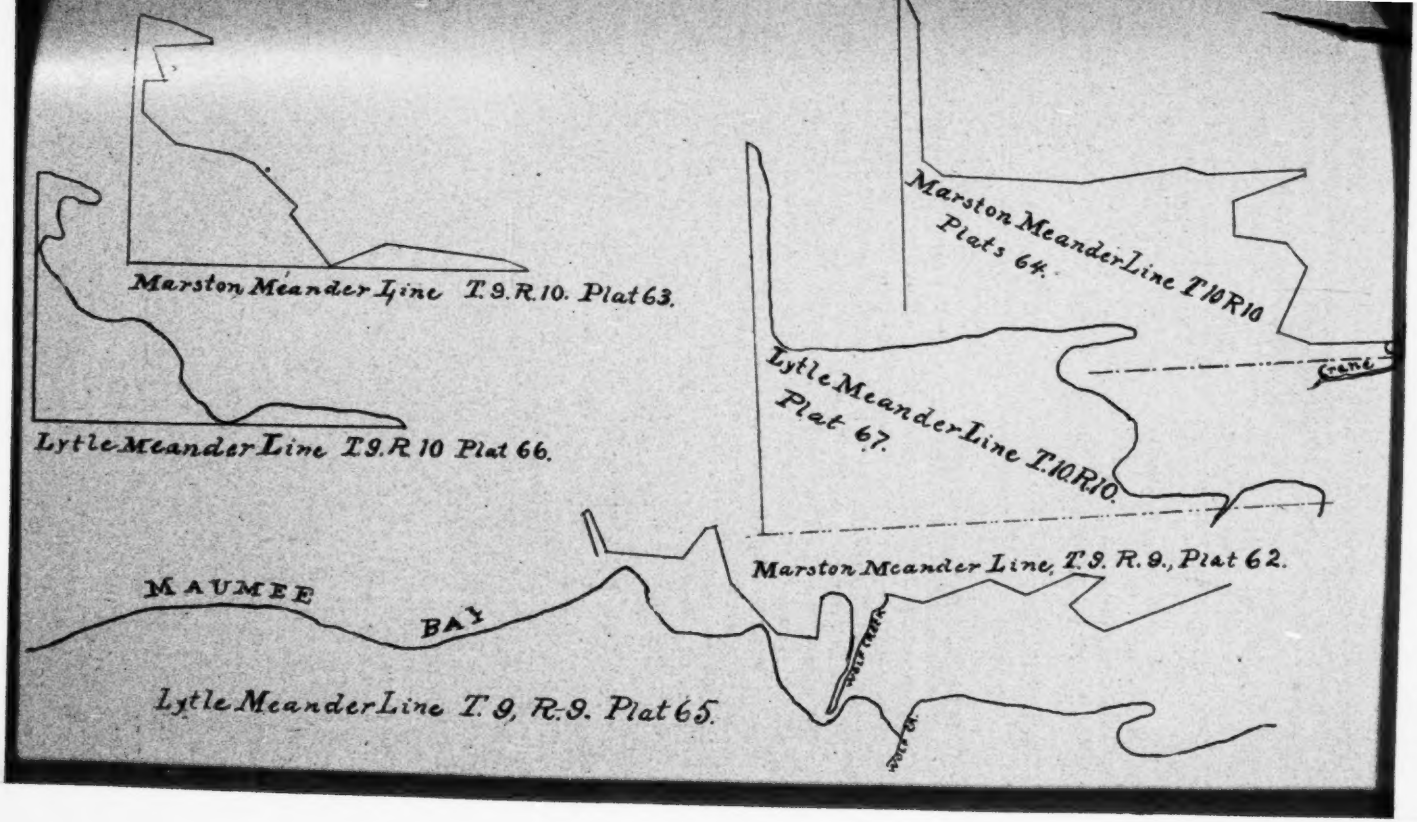
How plainer language could be used it is difficult to see.

To show the Court at a glance how completely the language of Judge Clifford, which has been not only approved by this Court but by the Supreme Court of every State formed from this Northwestern territory, for the sale of which our land system was *devsied*, applies to the case at bar, and how contradictory and self destructive the evidence offered by the Cedar Point Club itself is, we give on the opposite page the meander line as shown on the Lytle plats offered by the Appellee marked 65, 66 and 67, aud the meander line as actually run by Rice and held by the Court below to be the boundary of the Bailey fractional sections as shown on the Marston plats 62, 63, and 64, drawn side by side.

But the position of the Court below fares no better in the other case quoted, (Horne vs. Smith, 159 U. S., 40), for the Court in that case, says page 43:

"It is also true that the *meander line is not a line of boundary* but one designed to point out the sinuosities of the bank of the stream and as a means of ascertaining the quantity of land in the fraction to be paid for by the purchaser." The Court further says on the same page: "That a water line runs along the course of the meander line cannot of course, in the face of the plat and survey, be questioned."

Yet in the face of the Lytle plat, offered by the Appellee itself, the Court does question that a water line existed, or rather holds that if it did exist at that particular time it was exceptional and not to be


Marston Meander Line T. 9. R. 10. Plat 63.
Lytle Meander Line T. 9. R. 10 Plat 66.
Marston Meander Line T. 10 R. 10 Plats 64.
Lytle Meander Line T. 10 R. 10. Plat 67.
Marston Meander Line, T. 9. R. 9., Plat 62.
MAUMEE BAY
Lytle Meander Line T. 9, R. 9. Plat 65.

considered, and this extraordinary proposition is based on the fact that according to the stipulation of the parties, as stated by the Court: "At the time of Rice's survey there was an unusual amount of water standing or flowing over the disputed land."

It is enough to say of this, that stipulations are to be construed with reference to the facts known, or that might be known, by the parties making them. Prior to 1834, no one but the red man saw the stages of water on the disputed premises, and he kept no record, and these parties could have no more knowledge on that subject than on the stages of water in Lake Erie at the time of Abraham, and the stipulations must of necessity refer to stages since that time.

Since then the water has declined both in Lake Erie and on the premises in controversy, and for this we have three reasons.

The sixty-thousand acres of upland drained into this marsh, then a dense forest, is now a rich body of farming land, and it is a matter of common knowledge that the destruction of such a body of timber would diminish the rain fall, and opening it to the sun causes a greater evaporation of what does fall, and cultivated fields absorb much more than forests. And what is true of these thousands of acres drained into this marsh is equally true of the millions of acres drained into the Great Lakes, where populous and prosperous States have taken the place of the Northwestern wilderness, and the water in the lake and on the premises in controversy has necessarily continued to grow less until, as this record shows, it had entirely disappeared, when this suit was commenced, from the disputed premises.

But suppose the water was exceptionally high at the time of the Rice survey, what of it.

The Government selected 1834 and 1835 to ascertain what it had for sale in these townships, and what was covered by water and should be turned over to the State.

Rice surveyed every foot that was not so covered by water that it could not be surveyed.

Lytle made his plats showing the water on these premises as a natural boundary of the premises to be sold. The Government sold, by these plats, all this land, and made the plats showing the water line as the boundary a part of the patents.

It is now seriously contended that if the Government found that at the time of the survey and sale the water was unusually high and when it receded to its ordinary line, a strip one or two or ten rods wide was left uncovered, the Government could come back and survey and sell it, and the rule that would authorize this survey and sale would authorize the survey and sale of a like strip from Niagara to Duluth and Chicago, all around the lakes.

Suppose the water had been unusually low and afterwards rose and covered part of the land inside the meander line, could the purchaser say to the Government, you sold me part of Lake Erie, and I want my money back.

The Government made this plat to show what land it had for sale. Both parties accepted the plat as giving the truth as to what was lake and what was land, the sale was made and the plat was made part of the conveyance, and neither party can be heard to question it,

least of all the Government which made the plat and made the sale and against which as grantor, as held by this Court in Harden vs. Jordan, the transaction is to be most strictly construed.

It is evident the Court below confuse the meander line as run by Rice and the water line shown on the Lytle plats.

The Court gives one of the Lytle plats, offered by the Appellee, showing the water line as the boundary of the Bailey grants, and says in the opinion: "It would be useless to speculate as to reasons which induced Rice to make *the marsh* the boundary of the fractions bounded thereon; that he did so there can be no doubt." Yet the Court in the decree makes not the *marsh*, or the water line shown on the Lytle plats the boundary, but the meander line actually run by Rice.

The proposition that Rice, a deputy surveyor, hired by the mile to make this survey, and under the strictest instructions from the land office, and under the absolute control of the Surveyor General, could make anything a line is but little short of preposterous. He was simply hired to make this subdivision by lines running North and South and East and West, unless he came to a natural boundary or an older boundary, which he was to locate, and when this was a natural boundary, that is a body of water, he was to point out its sinuosities and ascertain the amount of upland to be paid for. This he did most faithfully. Surveyor General Lytle made the plat and laid down the water line.

There is not the slightest indication in Rice's field notes that he did anything more or less than every deputy surveyor is required to do in running every meander line.

If what Rice did in this case makes the meander line run by him the boundary of these eleven Bailey fractional sections, precisely the same action by every other deputy surveyor should make every other meander line ever run a boundary.

This was undoubtedly the idea which prompted the Land Office to issue the circular under which the Marston survey was ordered, which as Judge Redfield well says set all the "land sharks of the country to gathering up the angles and gores and margins covered by it.

Yet, so far as we have been able to find, no Court has ever sustained a patent granted under it, while patents without number have been set aside, as in the case of Harden vs. Jordan.

It would hardly seem necessary to say more on the proposition that the meander line as run is not a boundary in this case, or in any other, but on account of the importance of the question to the parties and as the Court below frankly admits that unless the meander line as run by Rice and adopted by Marston, was run as a boundary the decree, they affirm, should have been set aside; the Court will pardon a brief review of the authorities on this question.

The first case ever carried to a Court of last resort under our land laws was Gavitt vs. Chambers, 3 O., 497, which was decided in 1828, seven years before the Rice survey was made and must have been well known to the Land Office as the only case giving a construction to their acts. In that case, as in this, the premises were meandered and the land below high water mark was not paid for to the United States.

The Court say: "The land usually covered by water has been deducted from that on which purchase money has been charged. This, it is claimed, is a fact conclusive to establish the proposition that the individual purchaser acquires no title to the bed of the river adjoining his lands. But we do not think it properly attended with this consequence. It is we conceive vitally essential to the public peace and to individual security that there should be distinct and acknowledged ownership, both to the land and water of the country. Otherwise intruders upon the common waste would fall into endless broils among themselves, and would involve the owners of adjacent lands in controversies innumerable. The United States would be little interested in preserving either the peace or the property, and would be powerless to do so without an interference with the policy of the State, as unsuitable for the Union to exercise as it would be inconsistent, if not dangerous to State soverignty.."

No better reason could be given for the rule laid down in Harden vs. Jordan as universal that "it has never been held that the United States reserves the land covered by water in front of its grants."

We can hardly conceive the confusion which would arise if the Government was held to be the owner of every lake or pond meandered by if when the adjoining land was sold.

This decision in 3 O., is held in June vs. Percell, 36 O. S., 407, to be the settled law of Ohio, and both the reasoning and the language of Judge Clifford, above quoted from 7 W., 286, is approved and adopted.

The Supreme Court of Michigan, in Palmer vs. Dodds, 64 Mich., 475, say: "The meander lines have no significance as boundaries, and are not intended as such."

The Supreme Court of Indiana, in Stoner vs. Rice, 121 Ind., 52, says: "To hold that the meander line constitutes a boundary would be against the great weight of authority, indeed the authorities are almost unanimous against such a doctrine."

The Supreme Court of Wisconsin in, Detroit Lumber Company vs. Whitney, 78 Wis., 240, in a case where a lake was shown on the plat, where no lake existed, disregarded the meander line and gave the grantee of a fractional quarter section the full quarter section with its lines extended until they met.

The Supreme Court of Iowa, in Schlosser vs. Cruckshanks, 65 N. W., 344, a most carefully considered case, rejected the meander line as a boundary, although it was proved that more dry land lay outside than inside the meander line at the time of the survey and sale, and quotes as authority for this ruling 28 cases, Federal and State.

Indeed, we have found but one case in a Court of last resort, neither have the learned counsel on the other side, that holds that the meander line was ever run as a boundary.

This is the case of Lammers vs. Nissen, 4 Nebraska, 245, and the holding in this case is more seeming than real.

The syllabus takes the broad ground that when it can be proved *aliunde* that the meander line departs from the winding of the stream, a Government grant is bounded by the meander line and does not extend to the stream.

The decision in the case was unquestionably right, though the statement in the syllabus is against all the authorities.

The Court, in their opinion, say the evidence establishes the fact that the surveyor "supposed the slough, on the West side of which he was running, was a portion of the river." This slough meandered was called on the plat the Missouri river, which was more than a mile away.

The slough meandered was unquestionably a legal boundary and the mistake in calling it the Missouri river was so palpable that any Court would correct it.

The Supreme Court of Iowa, in Schlosser vs. Cruckshank, 65 N. W., 346, in which this case was quoted as authority for the doctrine contended for by the Appellee, in the case at bar says: "The meander line as run did not touch the river but was along the banks of an ancient slough. The case appears to hold that while the plat showed the meander line to run along the river, evidence *aliunde* could be introduced to show that it was not the river which was meandered but the slough."

The case of Glenn vs. Jeffries, 75 Iowa, 20, was quoted to the same effect, in Schlosser vs. Cruckshank, above referred to as it was by counsel in this case, but the Court say of it: "Glenn's case was one where the Government surveyors in making the survey meandered a bayou, which it would seem they supposed was the Missouri river. This bayou was a body of water which furnished a natural boundary and it was this body of water which was in fact meandered, and not the river. Plaintiffs took to the body of water actually meandered, not to the body of water that lay beyond it. Beyond this bayou, which in fact was meandered, lay the land in controversy which was not meandered at all, and it was held the Plaintiff had no title to this land."

The Court below say the case at bar is governed by that of Horne vs. Smith 159 U. S., 40.

In that case lot 7, in section 23, and lots 1 and 2, in section 26, were meandered on a bayou which was called the Indian river, which in fact was a mile or a mile and a half west of this bayou and in section 22 and 27.

The preposterous claim was made by the patentee of these three fractional lots, that on account of this mistake in the name of the water course meandered, these lots should be extended beyond the water course meandered, and beyond the legal boundry of the lots patented, which could only contain 80 acres if full, and beyond the sections of which they were a part and across two other sections not named in the patent, to the real river.

The bayou being a legal boundary nothing is clearer than that a mistake in naming it would be corrected, and if it was not the grant would be confined by its very terms to the portion of the sections named, of which the fraction was a part, as in the case of Whitney vs. Detroit Lumber Co., 78 Wis., 240, quoted by this Court with approval, and in Palmer vs. Dodds, 64 Mich., 475, and Stoner vs. Rice, 121 Ind., 50.

The Court expressly say that: "The question in the case is whether the boundary of the lots is the bayou or the main body of the river."

How this declaration that meandered fractions are bounded by the water course actually meandered can be tortured into authority for making the meander line actually run and not the body of water meandered the boundary would be difficult to see, even if the Court had not in express words excluded the conclusion drawn from it by the Court below, by expressly declaring, page 43, that: "It is also true that the meander line *is not a line of boundary* but one designed to point out the sinuosities of the bank of a stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser."

II.

We come now to our second proposition, that the premises in controversy were at the time of Rice's survey

PART OF LAKE ERIE.

The Court below admits that if the premises in controversy were at the time of Rice's survey part of Lake Erie that, "the submerged lands would not be subject to grant by the United States, and the title of the Cedar Point Club would fail without regard to the goodness or badness of the title claimed under the doctrine of reliction by the Appellant."

In support of this proposition the Court quotes the following cases:

John Pollard, et al., lessees, vs John Hagan, 3 How., 212; McCready vs. Virginia, 4 Otto., 394; Weber vs. Harbor Commissioners, 18 Wall., 57; Hardan vs. Jordan, 140 U. S., 371, and Scranton vs. Wheeler, 16 U. S., 152.

The later carefully considered case, Illinois Central R. R. Co. vs. Illinois, 146 U. S., 387, not quoted by the Court, is conclusive that this proposition of the Court below is sound law.

In James vs. Howells, 41 O. S., 696, involving these premises, where besides the field notes and plats, a large number of witnesses were examined, including many engineers, the Supreme Court of Ohio found from the evidence, "on both sides," that "Rice and Lytle treated the bank along the South edge of this so called impassable marsh covered with water, as the shore of Lake Erie, the marsh as part of the lake and Cedar, Sandy and Crane Islands as islands in the lake.

* * The meander line along the southerly edge of the marsh was in fact along the southerly edge of the lake."

Here we meet with a singular thing. In the Court below, while the learned counsel on the other side stoutly contended that the decision in the above case was entirely erroneous, as they were compelled to do, to maintain any standing in Court, they make much of a pure *obiter dictum* in the same case, as follows:

"Moreover the act of 1805 expressly provides that the boundary lines actually run, and marked in the survey returned by the Surveyor General, shall be established as the proper boundary lines of the sections or subdivisions of which they were intended, and the length of

such lines as returned shall be held and considered the true length thereof." Including the *meander*, all the lines of Margaret Bailey's fractional sections were actually run, marked and returned. Hence the provision touching lines not so run and marked does not apply to her lands."

In the first place nothing is plainer than that this provision of the act of 1805 refers to the lines named in the Laws, which are only North and South and East and West lines except when a natural boundary, that is a water course, or an Indian boundary or an older boundary interferes, and can by no possibility apply to a line nowhere named in our land laws but devised by the Land office, as Judge Clifford says, "for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

Second, Rice did not make a single mark on the whole eleven miles of this line, and we challenge the production of one scintilla of evidence from this record that Rice did anything in connection with this meander line that every deputy surveyor is not required to do in running every meander line ever run.

This simply shows what a mistake it is for Courts to leave the well considered principles and facts decisive of a case to talk from the impulse of the moment of outside questions and facts, in no way material.

If the premises in controversy were at the time of Rice's survey part of Lake Erie, or even a shallow lake or pond, this Court has held in Hardin vs Jordan, 140 U. S., 381, that the Courts of the State have the sole right to say what the rights of riparian properties are, and the rights of the United States as riparian proprietor are in no respect different from or superior to the rights of an individual.

The Supreme Court of Ohio, in Sloan vs. Baymiller, 34 O. S 492, fixes the boundary of all riparian proprietors on Lake Erie, at "the line at which the water usually stands, when free from disturbing causes," and this as applied to the case at bar means as the water stood in 1834 and 1835, and not as it stood one year or ten years before that date, or nearly fifty years after when Marston made his survey in 1881.

In considering the rights of the Appellant, this decision renders it unnecessary to consider the learning on the subject of reliction for the boundary lines being fixed "at the line at which the water usually stands when free from disturbing causes," if the water rises and advances upon the lands of the riparian proprietor his line must of necessity retire, and if it retires his line must of necessity advance as the water recedes.

If, then, the premises in controversy were at the time of Rice's survey part of Lake Erie, and during the sixty years from that time to the commencement of this suit the waters of the lake had retired as this record conclusively shows from all of them, it seems plain that the line of the Margaret Bailey frational sections advanced year by year as the water retired, and we see no escape from the conclusion that at the commencement of this suit all the premises in controversy

belonged to the Appellant, of course subject to any rights of Norton & Howell as patentees of the islands, which can in no way be affected by this suit.

If the case of James vs. Howells, 41 O. S., 696, had been between the same parties as well as involving the same subject matter it would of course end the case, but as the Court below say not being between the same parties it has not the force of *res adjudicata*, and this case must be decided on the facts in this record, giving to the opinion of Ohio's Court of last resort such weight as the high position of the Court and the fact that its decision was based on a fuller knowledge of the facts than this Court has, or any other Court can ever have, may entitle it.

On the question under consideration the Court below say (see page 56 Record): "While under the stipulations as to the facts we must regard the condition of the marsh at the time of Rice's survey exceptional, we have no such liberty in regard to its condition when Marston made his survey. * * * There is no evidence in this record that the land in controversy *is* land continually under not less than six inches of water, in seasons when the water is lowest, such as was found in the Ohio case. No such state of facts is shown in this record and by no stretch of imagination could any Court, upon this record conclude that *this low, swampy body of land, partly boggy, partly dry*, and sometimes subject to temporary inundations, was so continuously under the water of the great lake as to be part of it."

It will be seen that this important question, according to the Court's own statement, was not decided on the evidence in this record as to the condition of the premises in 1834 and 1835, when Rice could not survey a foot of them on account of the permanent presence of water, but on their condition near fifty years after that date when the water of the lake had so far subsided, from the causes above stated, that Marston could and did survey the entire marsh and found no water standing on any part of it except in the pond holes, and no water line except that of the open waters of the lake and bay, as his plats show.

And all this, because it is stipulated that the water of the lake was above its ordinary level at the time of Rice's survey

It is enough to say of this extraordinary proposition, in addition to what has already been said, that if the water was unusually high during the years of 1834 and 1835, "the water as it usually stood when free from disturbing causes," during these years was the boundary of the lands held by the United States as riparian proprietor fixed by the Supreme Court of Ohio, in Sloan vs Baymiller.

The United States being a mere riparian proprietor with precisely the same rights as any other riparian proprietor, no more, no less, the Government selected these two years to decide what was lake and what was land, or in other words, what belonged to the State and what to itself, and by the very terms of the transaction the Government transferred to its grantee, by the Bailey patents, all rights it might have acquired by holding the land until the water was lower, subjecting the purchaser to all loss it might have sustained if the water had risen higher.

It is a matter of common knowledge that the loss incident to having such a neighbor is not small. As an illustration of this self evident fact, it may not be improper to state that nearly half the land inside the meandered line, in sections 19, 20 and 21, bordered by this aggressive and irresistible neighbor as shown on the plat, given in the opinion of the Court, page 50, patented to Margaret Bailey at the same time as the eleven involved in this suit and paid for by her, have been washed away and are now part of Lake Erie.

What then does this record show as to whether these premises in 1834 and 1835, were lake or land.

The following is the evidence and all the evidence disclosed by this record on the subject:

1. Rice, in the two years he was engaged in this survey, did not survey any of the disputed premises, although he surveyed all round them except for about three-quarters of a mile on the East, where the meander line of the main land is separated from the meander line of the islands, as shown on plats 61 and 67, by what Rice calls "the inundated marsh of Lake Erie," and on the west for about one mile and a half where the dotted line on plat 59 and the continuous line on plat 65 show that the impassable marsh covered with water joined the open waters of Maumee bay.

His field notes are conclusive evidence that he did not survey these premises because the water on all parts of them was so deep as to render them impassable and of course unsurveyable.

2. Rice meandered the so called islands, separating the "impassable marsh covered with water from the lake and bay on one side on the marsh and on the other on the open waters of the lake and bay, and must have found the waters on both sides standing substantially on a level or he would not have called them islands.

An island does not mean a body of land with water on one side and "*a low, swampy body of land, partly boggy, partly dry,*" on the other.

3. In the official correspondence with the Land office (see page 36 of Record), in connection with which investigation must of a necessity have been made, both by officials of the Land office and of Ohio, the premises are described as follows:

Deep marsh covered with water, - -	9 s 9 e	2,500 acres.
" " " " " - - -	9 s 10 e	1,500 "
" " " " " - -	10 s 10 e	2,000 "
		6,000 acres.

4. But it seems to us the Lytle plats, 65, 66 and 67, offered in evidence by the Cedar Point Club itself, and found between pages 46 and 47 of the record, are conclusive on this question.

And let it be noticed that Lytle's plats when approved by the Land office and incorporated in the Bailey patents, were the final action of the Government, which cannot be questioned by the grantee, and much less by the grantor who made them and sold the land by them.

Plat 65 offered by the Appellee, and given in the opinion of the Court, page 50, shows a water line extending more than three miles along the South shore of Maumee bay and continued through the balance of the township, and through township 9, range 10, and

township 10, range 10, in plats 66 and 67, without a break, along the Southwest margin of this impassable marsh covered with water. Three-quarters of a mile north of this, and across what Rice calls "the inundated marsh of Lake Erie," another water line commences, running along the Northeast margin of this marsh and Southwest of the islands, some eleven miles to Cedar Point, and then South along the margin of the marsh about half a mile to the South end of Cedar Point, where it strikes the open water of the bay, with open water for a mile and a half separating this meander line from the other.

That the premises in controversy, this "impassible marsh covered with water" ends in the open water of the lake is clear. Rice's field notes, on page 15 of the record, are as follows: "East between Secs. 11 and 14, 36.00 to Crane Creek 1.00 wide, runs N., stagnant; 40.00 set a post for Cor. of quar. secs. in inundated marsh; 75.00 set a post in S. W. margin of inundated marsh of Lake Erie." He made no attempt to survey any part of Secs. 12 and 13, T. 10, R. 10 east of 11 and 14, and all the plats show that this inundated marsh of Lake Erie was entirely open to the lake on the northeast.

That is, this "impassable marsh covered with water," or as the Land office has it, this "deep marsh covered with water," ends at one end in "the inundated marsh of Lake Erie," and at the other in the open water of Maumee bay, without a break, or a foot of land intervening anywhere, and is clearly a mere extension of the bay, where, on account of the shallowness of the water and the protection of the islands, aquatic vegetation grew.

Indeed the light dotted line, on plat 59, showing the junction of the marsh and bay, excludes the idea of a land line of separation between them.

How a more complete demonstration could be made, that the premises in controversy, were a continuous body of water, connected at one end with the open waters of the bay and at the other end with the water of the lake itself, in this "inundated marsh of Lake Erie," it seems impossible to conjecture.

In the language of the Supreme Court of Ohio, in James vs. Howells, 41 O. S., 696, above quoted, this "impassable marsh and water was part of Lake Erie, and Cedar, Sandy and Crane Islands were islands in the lake."

5. But the lake itself has made a record on this subject that admits of no question.

It is admitted in the agreed statement that Sandy and Crane Islands were washed inshore between the Rice survey in 1834-35, and the Marston survey in 1881 (see last clause of paragraph 18, page 30, Record).

In the official correspondence of the Land office, page 34 of Record, the premises in controversy are spoken of as containing 2,500 acres, in township 9, range 9, and 1,500 in township 9, range 10, and 2,000 in township 10, range 10, or 6,000 acres in all, which is practically what it shown by the Lytle plats.

Indeed, we must presume that both the State of Ohio and the Land office, having every means of accurate *knowledge* on the subject, are substantially correct.

The amount named in the 95 patents under which the Cedar Point Club claims, added together, amount to 4,700 acres, which shows that 1,300 acres which were inside of the islands at the time of Rice's survey, were in the open lake at the time of Marston's survey.

Sandy and Crane Islands are about 7 miles long, which would give 14 acres to the rod in width, so that these islands must have been washed in about 90 rods to account for the loss of this 1,300 acres. But this is not all. Plats 59, 60 and 61, show Cedar, Sandy and Crane Islands, for the whole eleven miles, as some 6 or 8 rods wide, and containing over 110 acres, while on the plats 65, 66 and 67, offered by the Cedar Point Club, the quantity is wholly omitted and the former islands are marked "sand ridge," except for a little distance on the East end of Crane Island.

This shows to a certainty that this whole chain of islands had been literally swept away, and they must simply have been rolled over and over in the water, in what Rice calls the "inundated marsh of Lake Erie," and not swept up by the Northeast winds on comparatively dry land, or we should have sand hills instead of a sand ridge.

The waters of Lake Erie must have been unusually high, much higher than they are shown by this record to have been, since to give its waves the mighty sweep and power to roll these island inshore for 90 rods.

The plats offered by the Appellee must have been copied from the Lytle plats, so changed by the Government itself as to show this great change, as well as the reservation of Cedar Point for a light house, after the original plats, photo-lithographs of which were offered by the Appellant, 59, 60 and 61, were made.

Supported, as it is, by this array of facts in the record, and mainly evidence offered by the Appellee itself, this Court will hardly be disposed to treat the finding of the Supreme Court of Ohio, that the premises in controversy were, at the time of Rice's survey, part of Lake Erie, and that the meander line run by Rice along the South bank of this impassable marsh and water "was, in fact, run along the shore of Lake Erie," as going beyond the range of a healthy imagination, as the court below does.

III.

OUR THIRD PROPOSITION

is that if the premises in controversy were not a part of Lake Erie, which it seems to us absolutely certain this record shows that they were at the time of Rice's survey, they were certainly a shallow lake or pond which the Government itself decided was meanderable, and as between the Government and the State of Ohio the land under it belonged to the State of Ohio, and the State of Ohio by a long line of decisions beginning with Garrett vs. Chambers, 3 O., 497, and ending with Limbeck vs. Nye, 47, O. S., 336, has surrendered all its rights to riparian properties.

The fact that the Government meandered this body of water and sold the premises, with this water line as the boundary, is in the first place the strongest evidence that it was such, and the Government itself and its grantee, the Cedar Point Club, would be most certainly

estoped from denying the facts shown by the plat after the sale, even if it had not acquiesced *in* it *for near* fifty years, the Government holding for many years that it had sold substantially all it had by the Bailey patents.

IV.

OUR FOURTH PROPOSITION

is that if the premises in controversy were neither a part of Lake Erie, or a shallow lake or pond, but were at the time of Rice's survey anything like what they are described by the Court below, "a body of low, swampy land, partly boggy, partly dry," or as counsel on the other side are fond of calling them, a "mere swamp," then the meander line was a pure mistake as well as the declaration of the government, persisted in for twenty years, that they "were swamp lands."

Swamp lands are never meandered but are surveyed with the upland, for the manifest reason that there is no continuous water line as a boundary.

Millions of acres of swamp lands have been surveyed by the Government and turned over to the States. If these premises were of such a character the meander line was a pure mistake of Rice, and platting it was a mistake of Lytle, and approving that plat was the mistake of the Land office, a series of mistakes a Court will hardly presume, in the face of the volume of evidence which shows there was no mistake; but assuming all this there being no meanderable body of water to limit the grants, by their very terms Margaret Bailey took the fractional sections extended precisely as Marston extended them.

As in the case of Whitney vs. Detroit Lumber Co., 78 Wis., 240, approved by this Court; in Horne vs. Smith, 159 U. S., 40, the plat showing that a lake purported to have been meandered when no lake existed, in the language of this Court, in that case, on page 45, the grant would convey "to the straight line which would have been the boundary of the quarter section, if accurately surveyed."

The only change in this language, to fit it to the case at bar, is to substitute *section* for *quarter section.*

It is true that under any of the claims made above that the Appellant would get more land than Margaret Bailey paid for, and counsel on the other side make much of the fact. Margaret Bailey only paid for about 4,000 acres, while the fractional sections extended contain near 7,000 acres.

Under this last proposition she only paid for 589 acres in section 27, township 9, range 9, and 585 in section 9, township 10, range 10, and 495 acres in section 10, township 10, range 10, while she would get 51 acres more in one case, 55 acres in another and 145 acres in the other, and more in some other cases; but if this was a pure blunder of the Deputy Surveyor and the Surveyor General and the Commissioner of the Land office, the conveyance was made, it was acquiesced in for near fifty years, and even if shown, no Court would correct it after this long delay.

If the field notes are true and the plat is the substantial truth, this land outside of the meander line was every foot of it absolutely worthless, and the Government got pay for all worth selling, and all

gained is gained under the liberal policy of the Government and the liberal decisions of Ohio, and by the action of the laws of nature acting continuously for sixty years.

IN CONCLUSION.

We submit these three alternative propositions:

I.

If the premises in controversy were at the time of Rice's survey, part of Lake Erie, as the Supreme Court of Ohio held in James vs. Howells, and as we claim this record conclusively shows, then under the ruling of this court, in Illinois Central Railroad Co. vs. Illinois, 146 U. S. 387, no part of them belonged to the United States, but they belonged to the State of Ohio, and under the ruling of the Supreme Court of Ohio, in Sloan vs. Baymiller, 34 O. S. 492, the water as it usually stood on these premises, when free from disturbing causes, at the time of Rice's survey (for the sale dates back to the time of making the survey and plat), was the boundary of the Bailey grants.

As this record shows conclusively that during the sixty years between the Rice survey and the commencement of this suit the waters of the lake had retired from all the premises in controversy, the line of the Bailey grants followed the water as it retired year by year, being at all times where it stood when free from disturbing causes, and all these premises would belong to the Appellant subject to the rights of Howells and Norton as patentees of the island.

II.

If these premises were not a part of Lake Erie then they most certainly were a shallow, meanderable lake, for this Court holds, in Horne vs. Smith, 159, page 43: "That a water line runs along the course of the meander line cannot, of course, in the face of this survey and plat be questioned."

That is it cannot in the face of this survey and the Lytle plats be questioned that a meanderable body of water existed where the plat shows it to have existed. If this body of water was not part of the lake, still as between the United States and the State, it belonged to the State as held by this Court in Harden vs. Jordan, 140 U. S., 371.

That case holds that it is for the State to say whether it will hold it or relinquish it to the riparian proprietors. By a long line of decisions, commencing with Garrett vs. Chambers, 3 O., 497, and ending with Limbeck vs Nye, 47 O. S., 336, the Supreme Court of Ohio has held that the land covered by all water in the State, except by Lake Erie, belongs to the riparian proprietors.

In this case the premises in controversy would belong to the riparian proprietors, to be divided according to the rules of law between the Appellant, as successor to Margaret Bailey, and Norton and Howells as patentees of the islands, or their grantees.

In neither of the above cases did the United States retain any title to any part of the premises in controversy, and the title of the Cedar Point Club must fail as the Court below says "without reference to the goodness or badness of Appellant's title."

III.

If there was no body of water here which was meanderable, in other words, if the plat of Lytle was an entire mistake, and the premises in controversy were as the learned counsel on the other side called them, a "mere swamp," or as the court below describes them, "a low, swampy body of land, partly boggy, partly dry," then by the terms of the grant and under the authority of Whitney vs. Detroit Lumber Company, 78 U. S. 240, approved by this Court in Horne vs. Smith, 159 U. S. 45, the Bailey grants went only to the straight lines, which would have been the boundary of the Bailey sections "if accurately surveyed," leaving the 1,700 acres outside of these lines, as run by Marston, to the Cedar Point Club or to the patentees of the islands, as the courts may decide.

Respectfully submitted,

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No. 80.

GERTRUDE JAMES NILES, APPELLANT,

vs.

CEDAR POINT CLUB.

REPLY FOR APPELLANT.

In Supplemental Brief

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The brief of counsel for Appellee The Cedar Point Club is certainly remarkable.

It commences by substantially admitting that the facts are correctly stated in Appellant's brief.

It is not questioned that Ambrose Rice, Deputy U. S. Surveyor, surveyed and meandered the eleven fractional sections patented to Margaret Bailey in 1844, now owned by the appellant Gertrude James Niles, under which patents she claims the premises in controversy, precisely as every deputy surveyor is required by the present manual of instructions to deputy surveyors, to survey and meander every section made fractional by a meanderable body of water, and precisely as every fractional section has been surveyed and meandered.

These instructions are given on page one of our brief and were strictly complied with by Mr. Rice showing that he was acting under similar instructions. That is, Mr. Rice run the section lines of each of these eleven fractional sections to an impassable body of water extending from section 22, township 9, south range 9 east, to section 11, township 10, south range 10 east, and beyond, and set stakes at the edge of this body of water, "as meander corners." He then commenced where the west line of section 22, struck Maumee Bay and run his meander line from meander corner to meander corner through the eleven fractional sections, to and including section 11, township 10, range 10, where he struck what he calls the "inundated marsh of Lake Erie," which was too deep to permit any survey of any part of sections 12 and 13, beyond sections 11 and 14 where his survey ends.

It is not questioned that Rice set his meander corners at the bank or edge of this "impassable marsh covered with water," and that he surveyed every foot of land that he could or should have surveyed, and which he was not precluded from surveying by the presence of this "impassable water."

It is admitted that Robert Lytle the surveyor general platted the premises in controversy as a meanderable body of water designated as "impassable marsh covered with water" on the copies of these plats which were offered by the Appellee itself in evidence numbered 65, 66 and 67, (see record immediately preceding page 47) which plats show the premises in controversy and all of them as an open body of water, open to Maumee Bay, which is part of Lake Erie for a mile and a half on the west and connected with and part of what Rice calls in his notes page 15, paragraph 18, of record, "the inundated marsh of Lake Erie" through which the waters of the Lake had a free passage from Lake to Bay back of Cedar, Sandy and Crane islands.

It is not contended or even suggested that there was any mistake in the field notes or plats, the sole ground in all reported cases, for the claim that the meander line is ever a boundary, and in the absence of which all the courts hold that field notes and plats by which land is sold are not only presumptive but conclusive evidence of the facts they purport to show.

This conclusive showing from the field notes and plats, which counsel admit are as much part of the Bailey patents as if copied into them; that the premises in controversy were in 1834 and 1835, when Rice made his survey, part of Lake Erie, counsel attempt to overcome by three things:

1. By dictionary and encyclopedia definitions of the word "marsh."

It is enough to say of these definitions that both field notes and plats conclusively show that the premises in controversy were not a mere marsh in the dictionary sense, but a body of water so deep that it could not be passed over and the land under it could not be surveyed on account of the permanent presence of this water during the years 1834 and 1835 while Rice was making his survey.

The term marsh was undoubtedly applied to these premises, because on account of the protection afforded by the islands from the north-east storms aquatic vegetation grew upon them.

If Rice had found the premises in controversy in 1834 and 1835 as Marston found them in 1881, forty-six years afterward, and as the Court below describes them "a low swampy body of land partly boggy, partly dry," he would unquestionably have surveyed them as Marston did, and certainly no man with an ordinary knowledge of the English language would have designated a narrow sand strip separating such a body of land from the open waters of the lake as islands in Lake Erie, as they appear on plats 59, 60 and 61, immediately following page 46 of the record.

2. But counsel make much of a stipulation in the agreed statement that during the years 1834 and 1835 the waters of Lake Erie were above their usual level.

It would seem probable that this stipulation was inadvertantly admitted, as the history of the country makes it certain that neither party could know anything about the stages of water in the lake before that date, and the admitted fact that after that date Sandy and Crane Islands were washed inshore show conclusively that the waters of the lake must have been very considerably higher to give its waves the mighty sweep and power required to wash these islands, seven miles long and eight or ten rods wide, as we compute, 90 rods inshore. (See Stip. 17, page 30 Rec.)

This change is shown on the plats offered by the Appellee, numbered 65, 66 and 67, above referred to, where the islands shown on plats 59, 60 and 61 are shown as mere sand ridges through one township marked by a single black line.

From this stipulation that in 1834 and 1835 the lake was above its usual level, and from the further stipulation that in 1893, 1894 and 1895 when it is admitted the premises in controversy were dry, an unusual drouth prevailed in the Great Lake basin, Counsel and the court below make the surprising leap to the conclusion that for the sixty years between these periods the premises in controversy were at an ordinary stage, what Marston found them in 1881, forty-six years after the first period and fourteen years before the last.

The cause of the drouth in 1893, 1894 and 1895 is perfectly well known and has been acting with increasing force for the last fifty years.

It is the wholesale destruction of the timber in what was in 1834 and 1835 the great north-western wilderness, and which, if continued, by reducing the rain fall will seriously interfere with the productiveness of this great granery of the world.

Its progress is most clearly traced in this record by the gradual lowering of the lake level from the time soon after Rice's survey when it swept the islands 90 rods inshore to 1876, when the Supreme Court of Ohio after hearing most voluminous evidence found that the lake at a low stage maintained six inches of water over the premises in controversy, and to 1881 when Marston surveyed all of them and found no water line upon them, and up to the commencement of this suit in 1896 when it is admitted they were dry and according to the bill of complaint were farmed in a large way by the defendants.

But taking this stipulation as it stands in connection with the second stipulation (p. 13 Record), that Rice was engaged in this survey during the years 1834 and 1835, under a contract made in 1833, and plats 59, 60 and 61 following page 46 of the record, which show a continuous water line extending three miles along Maumee Bay, which is a part of Lake Erie, and continued without a break for eleven miles along the southwest margin of the premises in controversy to what Rice calls the "inundated marsh of Lake Erie," at the end of Section 11, T. 10, S. R. 10 E., which inundated marsh of Lake Erie is entirely open to the lake, the fact that these premises during those two years were covered by the lake and that the meander line was the southwest margin of Lake Erie is established.

When we add to this the further fact that these plats show a continuous water line all around Cedar, Sandy and Crane islands, which are distinctly shown as islands in Lake Erie, this evidence becomes complete.

The possibility that land separated the premises in controversy from Maumee Bay is excluded by the light dotted line on plat 59, marking the junction of the open bay for a mile and a half with the body of water called marsh, which being protected from the northeast storms aquatic vegetation grew upon it. But this demonstration that during these two years Rice was engaged in this survey all the premises in controversy were part of Lake Erie is supplemented and made absolutely conclusive by the copies of the Lytle plats offered by the Appellee, the Cedar Point Club from the records of the office of the Surveyor of Lucas County, made evidence by the laws of Ohio.

These plats are numbered 65, 66 and 67, and are given immediately before page 47 of the Record and on them all the premises are marked as "impassable marsh covered with water," entirely open to the lake at both ends. This conclusive proof that for two years all the premises in controversy were covered by Lake Erie, and that their south-western edge was the shore of Lake Erie cannot be swept aside by the suggestion of the Court below that this was a

mere temporary condition, even if it had been proved that immediately after Rice's survey was completed the water fell instead of it being admitted as it is on page 30 that instead of falling, the water rose so as to wash "Sandy and Crane Islands shoreward."

This period of two years, during which this high water continued, is far too long to be the result of temporary causes, or what the Supreme Court of Ohio, in fixing the line of riparian owners on the lake, calls "disturbing causes." It could only have been produced by causes effecting the Great Lake basin acting for some time before these two years, and which must have continued to act some time afterwards, as we know they did, to cause the even higher water which swept away these islands.

Nothing is better known than that great bodies of water like the chain of great lakes do not change their level in a day or month or year, but require long periods for any substantial change and what the Supreme Court of Ohio found in 1876 is what might be expected that the feet of water covering these premises in 1834 and 1835 had been reduced to inches in 1876, and that these inches disappeared in 1881, when Marston made his survey, leaving "a low, swampy body of land, partly boggy, partly dry," and that this swampy land should become great hay and plow fields in 1896.

This is precisely what the wholesale destruction of timber and the diminished rainfall and the greater absorption and evaporation through the Great Lakes basin would lead us to expect, and what this record conclusively proves, has taken place.

If the premises were at the time of Rice's survey part of Lake Erie, they could not have been reserved by the United States, and the title of the Cedar Point Club must fail as the court below admit "without reference to the goodness or badness of the appellant's title," for this court in Illinois Central Railroad Co. vs. Illinois, 146 U. S. 387, and in many other cases, has held that the land under the water of the Great Lakes belongs to the state in which it is situated.

The Supreme Court of Ohio in Sloan vs. Baymiller, 34 O. S., 492, holds that the boundary of riparian owners on Lake Erie is "the line at which the water usually stands when free from disturbing causes" and this line must of necessity advance or recede as the water rises or falls, and there can be no difference between the rights of the United States as riparian proprietor and the rights of its grantees.

Whether the water of the lake was above its ordinary level in 1834 and 1835 or not, counsel practically admit that during those two years they covered the premises in controversy, and the government selected those years to settle the question of what was lake and what was land, or in other words, what belonged to the United States and what to the State of Ohio, and nothing is plainer than that by the patents to Margaret Bailey which date back to the time of the survey, the United States transferred to her any rights it might have gained by the receding of the lake, as it imposed on her any loss that might result from the rising of the lake level.

It is clear beyond question that in 1881 these premises had ceased to be part of Lake Erie, and we fully agree with the court below.

that "by no stretch of the imagination could any court conclude that the low, swampy body of land, partly boggy, partly dry," which Marston found in 1881, "was so continuously under the water of the great lake as to be part of it."

It is equally plain that when Rice made his survey in 1834 and 1835 it was so continuously under the water of Lake Erie as to be unsurveyable and impassable, and by the same reasoning part of it, and "the bank along the south edge of this impassable marsh covered with water" meandered by Rice was then, as the Supreme Court of Ohio says in James vs. Howell, "the shore of Lake Erie," and as the water, as it stood along that bank at the time of Rice's survey when "free from disturbing causes," was the line of the United States as riparian proprietor, and as the United States transferred its rights as riparian proprietor to Margaret Bailey, and as the water of the lake had so far receded before Marston's survey in 1881, as to leave no part of these premises "so continuously under the water of the lake as to be part of it," and especially as before the commencement of this suit the waters of the lake had so far receded as to leave the premises dry and not subject to the overflow and capable of ordinary farming without any protection, we see no escape from the conclusion that the line of the appellant has followed these receding waters, and that her title to the premises is unquestionable.

3. But counsel quote with much satisfaction from a forgotten brief of one of the counsel for the Appellant filed as counsel for James in James vs. Howell, 41 O. S. 696.

Though not very high authority in this Court that brief is significant on this.

It clearly shows that counsel understood that Rice's survey and Lytle's plats showing the premises in controversy as part of Lake Erie must be shown to be mistakes or it must be proved that the Lake had so far receded that they were no part of it in 1876, and that when Sandy and Crane islands were patented to Howell as islands, they were no longer in any proper sense islands in Lake Erie.

When this case was tried in 1876 witnesses could have been called who had been familiar with the premises from the time of Rice's survey and it is to be presumed that counsel with this necessity before him would have called all who would take his view of the subject and with what result :

The Court say on the bottom of page 708 : "According to the evidence put in by James and Howell, at a low stage of water there is six inches of water in the marsh and more in the straits." On page 710 the Court further say, "But as already stated that evidence establishes the permanent presence of water between the islands and James meander line ; that this water was maintained there by the lake, and for the purpose of constituting a boundary under the Act of 1796, was part of the lake.

It is true the channel between the meander line and the islands was not navigable, but that, in our view, is immaterial. The Statute does not say "navigable water" or "navigable channel," but "naviga-

ble rivers"; hence when a river itself is navigable, the government surveyor may treat any part of such river as a boundary as well a part that will not permit the passage of a boat as those deep enough to float the largest vessels.

"Rice and Lytle treated the bank along the south edge of the so-called "impassable marsh covered with water" as the shore of the lake, the marsh as part of the lake, and Cedar, Sandy and Crane Islands as islands in the lake. It does not appear that the Commissioner of the Land Office disapproved of their actions." *Ibid* 711.

That is, the Court not only found that the premises in controversy were treated by Rice and Lytle as part of Lake Erie in 1834 and 1835, but that in 1876, after the wholesale distruction of timber in the Great North-west for a quarter of a century, with the necessary diminution of rain fall and the lowering of the lake level they were still part of the lake.

That counsel for James considered himself fairly beaten is evident from the fact that while this Court was open to him to seek a reversal he did not seek it, as from our knowledge of him he certainly would have done if he had seen a reasonable chance for success.

But counsel claim that "the title of the Federal Government is more absolute than that of an individual can be" and that while grants are to be strictly construed as against the private grantor, "the opposite is the rule applied to the grant of the Government." Under this claim they insist that while quantity or number of acres in an ordinary deed, "is regarded as a mere matter of discription, something by which the premises are to be identified but not as a limitation upon the quantity or an extension of the quantity but merely as one of the incidents of discription, yet in a Government patent it is to be regarded as a matter of essential discription."

This conclusion of counsel results from confounding two things only alike in name. That is the trust title by which the United States holds the waters of the country for the protection of navigation and the title by which public lands are held merely for transfer to private owners.

Grants by the Government in derrogation of the public right of navigation like the grant of a right to bridge a navigable stream must of course be strictly construed, and the grantee can only claim what is expressly and clearly granted.

All the reasons for this rule as applied to grants by the King, apply with equal force to such grants.

But to apply this rule to the transfer of public land to private owners approaches the absurd.

Every reason for construing a grant most strongly against the grantor applies with especial force to such a grant.

Every step in the transaction and every word in the patent is the work of the skilled agents of the Government over whom the patentees have no control.

The idea that such a document should be construed in favor of the grantor, acting through the most skillful agents and against the unskilled and powerless grantee, is little less than monstrous and is not the law as laid down by the courts.

This Court, in Hardin vs. Jordan, 140 U. S. 383, quotes with approval the following language of the Supreme Court of Illinois: "Where the Government has not reserved any right or interest that might pass by the grant nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorable for the grantee, and that it intended all that might pass by it."

But the court below assumes "that there is no doubt" that the United States, in the person of Deputy Surveyor Rice, showed its intention to reserve the premises in controversy by running the meander line on their south-west margin. We show from Rice's field notes that he did precisely what every Deputy Surveyor is required to do, and has done, in meandering every fractional section ever surveyed, and show by the reason of the case and by an overwhelming preponderance of authorities, that in running this meander line Rice was the mere instrument of the law in locating a natural boundary, and the mere agent of the land office in ascertaining the amount of land to be paid for.

Again we find from the official correspondence of the land office, offered in evidence and given in the record commencing on page 33, that in 1850, under the swamp land act of that year, the State of Ohio demanded the land in controversy as swamp land, which claim was passed upon by the land office and rejected in these words, "not swamp land and nearly all sold."

It appears from the letter of the land commissioner to Hon. John Sherman, dated January 23, 1872, that this ruling was persisted in up to that date, as it was up to 1876, when Sandy and Crane islands were sold to Howell as islands, the Lytle plats being made part of his patents.

Counsel admit that the reason for this ruling of the land office, that the premises in controversy were not "swamp land," was because they were "so under the dominion of the lake that they could not be reclaimed by dykes or levees." In other words, that they were not swamp lands but part of Lake Erie.

They say on the bottom of page 8 of brief: "This marsh was not at the time of Rice's survey or at the taking effect of the swamp land act, and is not now capable of reclaimation from the humidity arising from their being nearly on the same level with the adjoining waters of the lake, nor from temporary inundations by the water of the lake otherwise than by permanent and substantial lowering of the lake or prevention of the gales from the northeast rolling its high waves upon them, either of which is a project the swamp land act did not contemplate."

In support of this they give this fair statement of the ruling of this court in United States vs. Louisiana 127 U. S., 182, as to the purpose of the act: "The purpose was to enable the States to reclaim the land by drainage, or levees to prevent overflow."

In 1834 and 1835 when Rice found a well defined shore of Lake Erie along the south-west margin of this "impassable marsh covered with water" and especially afterward when the water of the lake had so risen as to give its waves the mighty sweep and power to wash Sandy and Crane islands, seven miles long and eight or ten rods wide, in shore as is admitted in the agreed statement (paragraph 17, page 30 of record) as we compute 90 rods it would of course have been idle to build dykes or levees against the high waves raised by the north-east gales" as they would have been swept away as fast as built, but there is not a word in this record that even tends to show that at the time of Marston's survey or at any time since, it would have been difficult or expensive to reclaim them.

Indeed the burden of the bill of complaint in this case is that "the defendants have cut and removed large quantities of hay, also have caused to be placed, herded and pastured, a large number of horses and cattle, to-wit, several hundred; and have plowed and planted thereon."

In other words the bill of complaint shows that the lake had so far receded that these premises could be used in a large way for ordinary farming without any protection from the lake.

The ruling that they were "nearly all sold" when nothing had been sold except by the Bailey patents in connection with the subsequent sales of the islands in 1861 and 1876 to Norton and Howell can only be construed as a disclaimer of any title of the United States after the Bailey patents except in the islands, or in other words to a distinct declaration that the premises in controversy were part of Lake Erie and not land belonging to the United States.

Yet this Court is now seriously asked to find in the face of this disclaimer by the highest official of the land office from 1850 to 1876, of any title in this "impassable marsh covered with water," that during all this time the Government was the owner of this whole territory having reserved it by the act of Rice in running a meander line along what he undoubtedly considered the shore of Lake Erie.

But even if these premises were not at the time of Rice's survey part of Lake Erie they are conclusively shown by the Rice field notes and the Lytle plats to have been a meanderable body of water or a shallow lake or pond.

In that case the title would not be in the United States but in the State.

This Court in Hardin vs. Jordan, 140 U. S. 380 says; "It has been the practice of the Government from its origin in disposing of the public lands to measure the price to be paid for them by the quantity

of upland to be paid for, no charge being made for the land under the bed of the stream or *other body of water.*

The meander lines run along or near the margin of such water are run for the purpose of ascertaining the quantity of upland to be paid for and not for the purpose of limiting the grant to such meander line.

It has never been held that the land under water in front of such grants is reserved to the United States or can afterwards be granted to others to the injury of the original grantees."

It has repeatedly been held by this Court that the only difference between land under the great Lakes and other bodies of water, is that land under the Great Lakes is held by the State in perpetual and in alienable trust, while it is for the State Courts to say whether the land under other bodies of water shall be held by the State or the riparian proprietors.

The Supreme Court of Ohio by a long line of decisions, commencing with 3 O. 496, decided in 1828, and ending with the late case of Lembeck vs. Nye, 47 O. S. 336 has uniformly held that the land under all water in the State except Lake Erie belongs to the riparian proprietors, which in the case at bar would be the appellant as successor to Margaret Bailey and the successors of Norton and Howell patentees of the islands to be divided between them according to the rules of law.

The cases cited by counsel to establish the proposition that the Rice meander line was run as a boundary and was an exception to the admitted rule that the meander line is not a line of boundary are certainly remarkable. No question of a meander line is involved in Bernheart vs. Ernhart, 54 Pac. 195, or in Brown vs Clemons 3 Howard 650, or in Gazzam vs. Phillips, 20 Howard 372, the three cases most largely dwelt on. The only question involved in Bernheart vs. Ernhart is whether the boundary of an Indian Reserve named in a treaty or the line run in the survey of that reserve, approved by the land office is to be treated by the courts as the true boundary.

This court in Stoneroad vs. Stoneroad 158 U. S., 240, held that when it was necessary to locate land covered by outstanding titles in order to survey and sell the adjoining public land, Congress had charged the land office with its survey and location on the ground, and that its action unless modified or corrected on appeal was final and could not be questioned by the courts, even when shown to be erroneous.

In Bernheart vs. Ernhart the Umatilla Indian Reserve by the treaty was bounded by Red Horse Creek. This reserve was surveyed in 1865 and resurveyed in 1871, and the survey approved in 1872, and the line in front of the premises involved departed so far from Red Horse Creek as to leave 152.76 acres between the surveyed and platted line of the Indian Reserve and Red Horse Creek.

The plaintiff's title came from patents adopting the plat showing the surveyed line of the reserve as one of his boundaries.

Under this patent for the land bounded on one side by the surveyed line of the Indian Reserve, the plaintiff claimed the 152.76 acres between that line and Red Horse Creek, the treaty line of the Reserve.

The Court held that the surveyed line of the Indian boundary, as laid down on the plat made part of the patent, was the boundary of the grant.

This is the whole case, and it is evident the plaintiff might as well have claimed the land outside of any of the other lines shown on the plat as boundaries of his grant as outside the line of the Indian Reserve as surveyed and platted.

It is needless to follow this rambling opinion further, as there was no meander line in any way involved.

Brown vs. Clement, 3 Howard 650, was this: Section 22 was made fractional by older grants, which left 203.17 acres in the southwest corner belonging to the government. This was divided into two lots under a circular of instructions sent out by the Secretary of the Treasury, one containing 92.67 acres and the other 110.50 acres.

The only question was whether the Secretary of the Treasury had power to authorize such a division, or whether the law requiring the division of the public lands into sections and the subdivisions of sections pointed out by the law was mandatory and must be followed in all cases.

The majority of the Court held that the Secretary of the Treasury had no such power, while the minority held the discretion exercised was given by the Act of 1820. In Gazzam vs. Phillips, 20 Howard, 372, the same question came up involving the same land, and the whole Court held with the minority in the first case, that the law gave the Secretary of the Treasury discretion to depart from the rigid rule of subdivisions in such a case as that at bar, and the first ruling was reversed.

There is no suggestion that any one from the deputy surveyor up to the Secretary of the Treasury had any power to depart from the sub-division of the public lands into sections and their legal sub-divisions unless older boundaries or natural boundaries rendered such departure necessary except as it was given in the law itself.

How this finding that the law itself gave the Secretary of the Treasury power to direct a different sub-division of the public land in a specific case where it would manifestly make the land more saleable and more available to the purchaser can be construed into authority in a deputy surveyor to divide three townships of Government land by a zigzag line running eleven miles through their entire length, which is utterly unknown to the law, we fail to see.

The claim of the Cedar Point Club rests upon the broad ground, as stated in the pleadings, and as found by the court below that the premises in controversy were not at the time of Rice's survey, part of Lake Erie or a shallow lake or pond but were a "low, swampy body of land, partly boggy and partly dry," belonging to the Government as much as the dry land on the other side of the meander line did. No

wonder the court below says: "It would be useless to speculate as to the reason that induced Rice to make the border of the marsh the boundary of the fractions bordering thereon."

If the premises in controversy were part of Lake Erie then the law made the water line the boundary, and all Rice had to do was to point out the sinuosities of the water as he did.

If Rice had been the proprietor of a military grant of a given number of acres and authorized to lay it off to suit himself we can well understand why he would want this line as a boundary, for the land on one side was valuable while the land on the other side was entirely worthless.

But that any sensible private owner should make such a division of his land or that any intelligent Government surveyor should make it, even if he had the power, is impossible to believe.

Counsel also make much of the case of Granger vs. Swarts, Woolworth Reports 88, which has for many years done service without avail in the briefs of nearly every lawyer who has claimed that the meander line in his especial case was a boundary. The substance of the case is in the following language of judge Miller's charge, on page 90.

"If between the meander line, which by the government survey was made one of the boundaries of the land sold to Walker and the bank of Rock River and Kosh Konong Lake there was at that time a body of swamp or waste land or flats on which timber and grass grew and horses and cattle could feed and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meander line.

On the other hand if *when the entries were made* the bank of the River and shore of the Lake at an ordinary stage of water were where this meander line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water or by accretion to the shore and bank, then it became the land of the defendant or Walker, as the title might lie in one or the other."

It will be noticed that in the first supposed case and in all others where the meander line is claimed as a boundary, the meander line itself is a pure blunder of the surveyor and does not show the real sinuosities of the body of water represented as meandered.

It would seem singular that a mistake of a deputy surveyor would enable him to inject into our land system a line utterly alien both to its letter and spirit, when no one of the judges in the two cases in Howard just considered intimated that the Secretary of the Treasury himself had any authority to depart from the letter of the statutes except as the authority was given him by the law itself in a special case where it would be manifestly for the benefit both of the government and the purchaser.

But this opinion of Judge Miller as it stands applied to the case at bar would be conclusive in favor of the Appellant.

It is not contended or even suggested that Rice's meander line departed at any point from the water line as it existed at the time his survey was made, on the contrary counsel for Appellee claim as a stipulated fact that it was "identical" with it.

The possibility of the growth of timber and grass or that cattle or horses fed and hay could be cut on any of the premises in controversy is excluded by the fact conclusively shown by the field notes of Rice and Lytle plats that they were all so covered with water as to be impassable and to render such growth impossible.

The true rule when a surveyor makes such a mistake as is supposed by Judge Miller is undoubtedly laid down by the Supreme Court of Indiana in Stoner vs. Rice, 121 Ind., 52, and of Michigan in Palmer vs. Dodds, 64 Mich., 475, and in a case quoted with approval by this court in Horn vs. Smith, 159 U. S. 40.

This court in that case say:

"Whitney vs. Detroit Lumber Co., 78 Wis., 240, was a case in which the meander line shown on the government survey was a half a mile or more from the real boundary of the Lake and the court in a very careful opinion discusses the law of official surveys and holds that as the *meander line was a mistake* the patent did not convey the land to the actual boundary of the Lake but to *the straight line which would have been the boundary of the quarter section if accurately surveyed.*"

This rule applied to every case where the surveyor by mistake did not show the true meander line would relieve this much discussed question of every difficulty.

It would preserve the fundamental principles of our land system, the best system ever devised; better than the Roman system, that all public lands shall be divided by north and south and east and west lines except in the language of the law, "an Indian boundary or an older boundary or a navigable stream" renders this impossible.

It would strictly conform to the terms of the grant and remove the supposed necessity of making the meander line a boundary to prevent extending the grant beyond what either party contemplated in case of great mistakes by the surveyor.

It is in harmony with the liberal policy of the Government in dealing with public lands in giving the patentee rather more land than he expected where he is deprived of the natural boundary represented on the plat which in many cases would add greatly to the value of the land, by the blunder of the Government officials.

This rule applied to the case at bar, if we are to adopt the strange conclusion of the court below that the premises in controversy were not part of Lake Erie as the field notes and plats represent them in 1834-1835, but what Marston found them forty-six years afterwards would give the appellant precisely what the Margaret Bailey patents call for—these eleven fractional sections, extended as the law commands they shall be extended, and as Marston extended them and not one acre more.

Counsel also refer to Lammers vs. Nissen, 4 Nebraska, 245, another standby of those who claim the meander line, in their particular case, is an exception to the admitted rule that the meander line is not a line of boundary, and Glen vs. Jeffries, 75 Iowa, 20. Both of these cases are precisely alike and identical with Horn vs. Smith, 159 U. S., 41. In each case a bayou or slough was meandered and in the two first cases called by mistake the Missouri river, and in the last case the Indian river, which stream in each case was a mile or more away and separated from it by a mile or more of land.

The body of water actually meandered being a lawful boundary, a mere mistake in naming it could not of course extend the grant beyond this natural boundary and far beyond the legal boundary of the fraction granted extended to its limits.

This court in the last case in express words declare the meander line was not the boundary line, but the stream meandered was.

Counsel also refer to the case of Grant vs. Hemphill 59 (Iowa), N. W. 233. But the Supreme Court of Iowa in the later case of Schlosser vs. Crinkshanks 65, N. W. 344, carefully review this case and all Iowa cases referred to and hold that the meander line is never a line of boundary, quoting 28 cases, state and federal in support of this proposition.

In that case the court did not limit the grant to the legal boundary of the parcel granted as above proposed but extend it to the body of water purporting to be meandered although it was proved that at the time of the survey there was more dry land outside than inside of the meander line.

The court below do great injustice to Mr. Justice Harlan by quoting from a letter to counsel and resting their opinion upon the quotation as an opinion handed down by the learned judge.

The fact is, Mr. Justice Harlan handed down no opinion and did not hear the case. It was fully argued orally before Judge Ricks in the Circuit Court, who on account of sickness after some six months' delay handed the papers to Mr. Justice Harlan for decree. He kindly offered to hear counsel in the evening during the session of the Supreme Court, but as the case was certain to be appealed, and as the object of both sides was to get the case forward, council for appellant declined to add to his labors. That he considered his decision as formal is shown by the fact that he added to the decree prepared by counsel the grant of an appeal and fixed the amount of the bond at the nominal sum of $250.

HENRY T. NILES
AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

No. 80.

Reply Brf. of Niles for Appt.

NOV 16 1899
JAMES H. MCKENNEY,

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Supreme Court of the United States

OCTOBER TERM, 1899.

No. 80.

GERTRUDE JAMES NILES, APPELLANT,

vs.

CEDAR POINT CLUB.

Reply for Appellant to Supplemental Brief.

HENRY T. NILES AND
FRANK C. DAUGHERTY,
Solicitors for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-15-'99

We admit to its fullest extent the first proposition in appellee's supplemental brief, that the Rice-Lytle plats are as much a part of the Bailey, Norton and Howells patents as if copied into them and it is therefore unnecessary to consider the cases cited in its support. We go even further and say that the Government having presented those plats to the purchaser as a true representation of the condition of the premises to be sold, and having by reference incorporated those plats in the instrument of conveyance as such representation, and the purchaser having accepted them as such, on the plainest principles would be estopped from denying their truth in the absence of clear proof of fraud or mistake.

This is undoubtedly the broad ground on which this court, in Horne *vs.* Smith, 159 U. S., 40, held that the existence of a water line shown on a plat cannot, in the face of the plat, be claimed not to have existed as shown.

It would seem unquestionable, on principle and authority both, that when no fraud or mistake was even suggested, as in this case, and when, as in this case, the transaction involving the truthfulness of the showing of the plats had been acquiesced in by both parties for forty-six years, or up to the date of the Marston survey in 1881, that anything shown by the survey or plats on their face or by fair inference cannot be questioned by either party.

We could have no criticism, unless verbal, to make as to the law of accretion or reliction as laid down by counsel for appellee, and this record supplies all the facts required by it.

To apply this law, or rather rule of reliction, to any given case it must appear that land which was submerged with substantial permanence has by the subsiding of the water ceased to be submerged with equal permanence; but it strikes us that under the evidence shown by this record the appellee is clearly estopped from denying that the premises in controversy were submerged with substantial permanence at the time of Rice's survey, and that it had ceased to be so submerged at the time of Marston's survey in 1881.

The first requirement of the circular under which the Marston survey was made, and which the appellee offers in evidence as authority for the survey under which appellee claims, is that it must be shown that the premises asked to be surveyed were "the beds of lakes (not navigable), sloughs, and ponds over which

the lines of the public survey were not extended at the date of the original survey, but which, from the presence of water at the date of such survey, were meandered;" and the second is that "by evaporation or the operation of any other causes, natural or artificial, the waters of such lake, slough, or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit in ordinary seasons for agricultural purposes."

Before a survey could be ordered under this circular of these premises it must have been made to appear to the satisfaction of the land office that at the time of the original survey the land was so covered with water that it could not be surveyed, and was therefore meandered, and that the water had so far subsided as to leave the land dry and fit in ordinary seasons for agricultural purposes, and the last fact must be established by sworn testimony produced by the party desiring the survey.

It is a most extraordinary proposition that appellee can claim under a survey based on the finding of the land office that the premises in controversy were at the time of Rice's survey covered with a meanderable body of water, and at the same time claim it was a mere swamp or marsh, in the ordinary sense of those words, or, as the court below find, "a body of low swampy land, partly boggy and partly dry," which could and should have been surveyed as Marston surveyed it.

It would be, if possible, still more remarkable to allow the appellee to claim under a survey based on evidence that in 1881 the water of this lake, slough, or pond had so permanently retired as to leave the land formerly covered by it in an ordinary season fit for agricultural purposes, and at the same time to deny, as counsel sometimes seem to do, that it had so retired, especially in the face of the stipulation that for some time before the commencement of this suit it was dry, and the allegation of appellee's bill that the defendants had been continuously and largely using the premises in controversy for ordinary farming purposes.

We see no pertinence in the case so largely quoted from Louisiana, as that was as clearly a case of annual flooding and subsidence as the valley of the Nile, and we do not see how any question of either accretion or reliction could arise in such a case.

But, on a broader ground, we see no reason to enter into the learning, not to say subtleties, of the books on the subject of accretion and reliction.

This is because the supreme court of Ohio has, as we think, wisely

entirely eliminated such questions from the real-estate law of that State.

If the premises in controversy were at the time of Rice's survey part of Lake Erie, as we think the survey and plats conclusively show, then, as is admitted by the court below, they belonged to the State, and could not be reserved by the United States. Being the property of the State, it is clearly for the State to fix the line of riparian owners bordering upon it.

One of the ablest judges who ever sat on the Ohio supreme bench, recognizing the fact that the Great Lakes, like the ocean, are laws unto themselves, and that no great or sudden changes ever affect them, except such as are the result of temporary disturbing causes, fixed the line of the riparian proprietor "at the line at which the water usually stands when free from disturbing causes."

Sloan *vs.* Baymiller, 34 O. S., 492.

If the water rises, the riparian proprietor must of necessity retire before it. If it retires, the State, instead of claiming the little space left uncovered at any one time, which would lead to endless confusion, with no practical good, gives it to the riparian proprietor as compensation for the possible loss from having such a troublesome neighbor.

Under this rule the line of the Bailey grants must of necessity have followed the receding waters of Lake Erie, being at all times as those waters stood when free from disturbing causes, and it is absolutely immaterial whether this retirement was gradual, as this record shows it was, or by more sudden changes, which from the nature of these great bodies of water could not be the case.

If, on the other hand, the body of water meandered by Rice was not part of Lake Erie, but any other body of meanderable water, as it most certainly was, and must have been found to be before the Marston survey could have been ordered, then this court settled the question in Hardin *vs.* Jordan, 140 U. S., 383, that the land under it was not reserved by the United States, but that it belonged to the State courts to decide whether it should be held by the State or turned over to the riparian proprietor.

The courts of Ohio by a long line of decisions, commencing with Gavitt *vs.* Chambers, 3 O., 496, decided in 1828, and ending with the late case of Limbeck *vs.* Nye, 47 O. S., 336, has held that the land under all water in Ohio, except Lake Erie, belongs to the riparian proprietor.

In this case it would be utterly immaterial whether the retirement of the water was gradual or rapid, as it would merely retire from the riparian proprietor's own land.

The cases quoted from Missouri and Texas have no application to the case at bar, as in each case the premises to which the accretion or addition is claimed had fixed lines run on the ground by metes and bounds, and are not additions claimed on a meander line or riparian boundary.

The case from the land office cannot apply for the reason that in that case the plat showed two meander lines, and the land office ordered a new survey, as it, of course, would, while in this case the meander lines are distinctly the meander line of Bailey fractional sections on one side and the islands on the other, and they nowhere meet, being separated on the west end for a mile and a half by the open water of what is called on the plats offered by the appellee "impassable marsh and water," and on the east end for three-quarters of a mile by what Rice in his field-notes, on page 15 of record, calls the "inundated marsh of Lake Erie," which the plats offered by both sides (61 and 67) show is entirely open to Lake Erie.

The case of Toledo Liberal Shooting Club *vs.* Erie Shooting Club, 90 Fed. Rep., 680, is only significant in this, that while the United States granted to the State of Michigan 4,000 acres as swamp land, under the Swamp Land act of 1850, they refused to grant the premises in controversy, only some five or six miles east of the Michigan grant, to Ohio, and the Government must be presumed to have had a good reason in the nature of the premises for the grant in the one case and refusal in the other, and the only conceivable reason is that the Michigan grant was swamp land and the other refused to Ohio was not what counsel and the court below call it, "a mere marsh or swamp," or, as the court below describes it, "a body of low, swampy land, partly boggy and partly dry;" and this, taken in connection with the declaration that it was nearly all sold by the Bailey grants in connection with the subsequent sales to Norton & Howells of the islands, containing only 127.90 acres, can only be construed as a distinct disclaimer of any title in the premises in controversy claimed by the State and containing, according to the Government showing, 6,000 acres, though this has been reduced to a little over 4,000 acres by the washing in of the islands.

We take no especial exception to counsel's statement of the

ground of appellant's claim except the clause "and at the time the surveyed land was conveyed by the Government in 1844." All patents for public land, of which a Government plat is made part, must of necessity date back to the time the plat was made.

The patents for the eleven fractional sections patented to Margarett Bailey in 1844, and Cedar island, patented to Norton in 1861, and Sandy and Crane islands, patented to Howells in 1876, of which patents the Lyttle plats are made part, as the appellee well says in the commencement of his supplemental brief, "as fully and to the same extent, to all intents and purposes, as if embodied in such patent," must of necessity rest upon the state of facts shown by the plats; otherwise we might have ten different states of facts to consider in ten different patents issued in ten succeeding years, of all of which one plat showing one state of facts is a part.

With this exception, we have no criticism of counsel's statement, which, omitting the above clause, would read as follows:

"The facts which counsel for appellant are driven to claim as constituting a foundation for appellant's contention are that this more than 4,000 acres of surface area between the surveyed lines of the lands patented to appellant's ancestor on the one side and the so-called islands on the other was at the time of the survey in 1834 and 1835 with substantial permanency a body of water such as the laws and regulations governing surveys of public lands authorized to be omitted from survey and sale; and that since that time its character has changed to that of substantial permanent land sufficiently discharged of water to become and be a proper subject of private ownership."

The fact that the premises in controversy were at the time of Rice's survey such a body of water as the laws and regulations governing the survey of public land authorized to be omitted from survey and sale is proved:

1st. By the fact that it was so omitted from survey and sale by the deputy surveyor, whose action was approved by the surveyor general and the Land Office, and that this omission was persisted in up to 1876, when Sandy and Crane islands were patented to Howells, and the Lyttle plats made part of his patent.

2d. Even if the correctness of the plats were questioned, which they are not, Rice's field-notes show that he surveyed every foot of land whose survey was not prevented by the presence during two years of "impassable water," which of course makes the land under it unsurveyable.

3d. By the finding of the Land Office on the demand of the premises by Ohio as swamp land, which necessarily involved a hearing and examination of the facts that they are not swamp land, but as late as 1852 were "deep marsh, covered with water," and that they were nearly all sold by the Bailey patents, with the subsequent sale to Norton and Howells of the islands, only containing 127.90 acres. This language, "nearly all sold," would unquestionably have been changed to all sold if the sale of the islands had been made before this hearing.

This can only be construed into a declaration that the premises in controversy did not belong to the Government, but were a meanderable body of water.

4th. By the solemn finding of the supreme court of Ohio, on fuller evidence than this court or any other court can ever have, that the meander line run by Rice was run along the shore of Lake Erie, and that the water between this line and the islands was part of Lake Erie, and that, notwithstanding the wholesale destruction of the timber in the Great Lake basin for twenty-five years and the necessary lowering of the lake, that the premises in controversy were still part of Lake Erie, which maintained upon them at least six inches of water when the lake was lowest, down to 1876, when that case was tried. In opposition to this array of evidence, what does appellee offer to prove that these premises were not a meanderable body of water at the time of Rice's survey, either in his original or supplemental brief?

Nothing—absolutely nothing—but their naked assertion that they were a mere marsh or swamp.

With all their skill and diligence, not one word of evidence was offered on the hearing of this case or can be found in the record to support this naked assertion.

As to the last clause of this statement, "that since that time (that is, since Rice's survey) its character has changed to that of substantial, permanent land, sufficiently discharged from water to become and be a proper subject of private ownership," we prove:

1st. By the fact that under the circular the Marston survey could only have been ordered on sworn proof to the satisfaction of the Land Office that these premises had become dry land, fit in an ordinary season for agricultural purposes;" and this evidence produced by the parties asking the survey under which appellee claims.

2d. By the Marston survey and plats offered by appellee, which show affirmatively that he surveyed the whole of these premises and found no water line upon them, and his statement, which is made part of the agreed statement, that he found no water standing upon them except in pond holes, and no water coming upon them except the drainage of the upland, which was substantially the same as in 1834 and 1835, and what was driven upon them by high northeast winds, a purely temporary disturbing cause, which could only last a few days.

3d. The stipulation (page 30 of Record) that "the major portion of these premises was dry during the summer of 1895."

4th. The allegations of appellee's bill that "the said defendants" (naming them), "combining and confederating together, have repeatedly entered upon said premises, well knowing the facts aforesaid, and have cut and removed therefrom large quantities of hay; also have caused to be placed, herded, and pastured thereon a large number of horses and cattle, to wit, several hundred head, and have also plowed and planted thereon."

We assert without fear of contradiction that there is not one scintilla of evidence in this whole record that even tends to prove that the premises in controversy or any part of them have been covered with water with any permanence or at all except from rainfall or from the temporary spreading of the drainage from the upland, in time of heavy rains, since the Marston survey in 1881.

When we consider the learning and diligence of counsel for the appellee and the time they have had for investigation, the fact that so little evidence was produced at the trial and so little law is found in their brief or supplemental brief to controvert any of the positions made in behalf of appellant is proof positive that such evidence could not be procured and that such law does not exist.

HENRY T. NILES and
FRANK C. DAUGHERTY,
Attorneys for Appellant.

Supreme Court of the United States.

No. 307.

GERTRUDE I. NYE, Appellant,

vs.

CEDAR POINT CLUB, Appellee.

BRIEF FOR APPELLEE.

POTTER & EMERY,

Solicitors for Appellee.

Supreme Court of the United States.

No. 302.

GERTRUDE J. NILES, Appellant,

v.

CEDAR POINT CLUB, Appellee.

BRIEF FOR APPELLEE.

POTTER & EMERY,

Solicitors for Appellee.

STATEMENT OF FACTS.

In the main we deem it unnecessary to take exception to appellant's statement of the facts upon which this controversy is based. It is at least proper, however, to say that while not directly calling in question the facts agreed upon and established, as to what has been and is the character of the land in controversy, appellant's counsel assumes without evidence, and bases his argument upon assumption, that the facts are the exact opposite of what the agreed statement of facts, and items of evidentiary fact, show that character to have been and to be.

That is, he assumes that the respective conditions of this land as shown first at the time of the Rice survey, second, at the time of the taking effect of the Swamp Land Act in September, 1850, third, at the time of the Marston survey, and fourth, in the year 1895, were each in turn the then normal and natural and measurably permanent conditions; and that the change from one extreme in 1834 to the other in 1895 was the result of gradual but permanent receding of the waters of the lake, whereby what was in 1834 a part of Lake Erie, or of a measurably permanent shallow lake or pond, had in manner aforesaid become measurably permanently dry land.

This is, we submit, clearly contrary to not only the fair meaning of the agreed facts, but to every item of evidence bearing upon this subject.

That the condition existing at the time of the Rice survey was unusual and exceptional, and why it was so, is set forth in the agreed statement of fact, item 16, printed record, pages 28 and 29, thus:

"16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from

the large bodies of land now in Ottawa, Wood and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein."

That the condition of the land, existing in 1895, was in turn unusual and exceptional, and what occasioned it, is in like manner set forth in the agreed statements of fact, paragraph 18, page 30 of printed record, thus:

"18. By reason of unusual drouth which during the years 1893, 1894 and 1895, prevailed quite generally over the region of country from which Lake Erie and its tributaries derive their waters, including that the drainage whereof was to and through the premises in controversy, the major portion of the said premises was dry during the summer of 1895, except in case of heavy local rains or when the adjacent waters of Lake Erie were higher than they usually were during that summer".

The general and normal condition and character of the land are shown:

1. By the fact that in 1834 surveyor Rice unmistakably distinguished it from that of either lake, bay, river or pond by designating it as "marsh".

2. By the fact that, in 1850, the question controverted between the state of Ohio and the United States, was not, whether this land was or was not in such manner a part of the bay or lake or covered by such body of water as that the state was for that reason entitled to it; but, rather, all parties treating it as land obviously and unquestionably subject to survey, and to absolute sale, by either the state or United States, the sole question was whether it was such character of land as the state was entitled to under the swamp land acts; and the conclusion reached, adhered to and acted upon by the Land Department was that it was not swamp land; which meant, at least, that the greater portion of the tract was not swamp land.

3. By the usual and natural condition and normal character of the land as reported by surveyor Marston, the correctness of which report is expressly agreed to by the parties hereto as the basis of submission of this case in their agreed statement of facts, paragraph 17, on pages 29 and 30 of printed record; and which condition and character are substantially set forth in Surveyor Marston's report, viz:

"The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it particularly in the south and west parts are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which without any well-defined channel, finds its way across the marsh to the lake. Again in heavy gales of wind it is subject to inundations from the lake, which upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake".

4. By the usual and natural condition immediately before

and until and except as temporarily changed by the extraordinary drouth of 1893 to 1895, as in effect and in all fair inference conceded by the setting forth in the ageeed statement of facts, paragraph 18, of the conditions existing in 1895 as exceptional, and setting forth the especial cause of such exceptional condition.

As matter of fact then we submit that each and every item of evidence and fact submitted in the case tends to establish the natural and normal condition and character of this body of land as having been and being such as the ascertainment and determination of the Land Department in 1850 found and adjudged it, and the actual survey and report of surveyor Marston in 1881 specifically confirmed it, and such as constituted it a proper subject of survey and sale as public land of the United States.

With reference to the boundary line in question appellant's counsel says that Marston "surveyed and subdivided this whole marsh shown upon the plats, taking as his southern boundary the meander line run by Rice". While this is true, the farther fact concerning this line is also true, and so stipulated by the parties hereto (printed record page 17, paragraph 6 and page 21, near top of page) that it "is identical with the boundary line between the surveyed lands and the 'flag marsh' and 'impassable marsh and water' as shown upon the plat of the survey made by Ambrose Rice". So, we also submit, that as a matter of fact it stands admitted that the existing "marsh" referred to as the natural boundary, coincided specifically with the mention and notation of it in the survey and upon the plat constituting the basis of appellant's title.

This border line of the "marsh" as surveyed by Rice is the southerly line of the Marston survey.

APPELLANT'S CONTENTION. UPON WHAT IT PURPORTS TO BE FOUNDED.

The ground upon which the title of appellee, claiming under the Marston survey, and patents in pursuance thereof, is called in question by appellant, is, that the title to this 4900 acres of land had previously passed from the United States to appellant's ancestor Bailey, and thence to appellant by operation of law arising upon and applicable to some one or other state of fact following:

1. That the tortuous actually surveyed and marked lines of the fractional sections, which it is agreed "were identical with the southerly edge of the marsh", was the ordinary statutory meander line, in that it was not in any sense a boundary line, and that the "flag marsh", was in no sense a boundary because the surveyor had no authority to thus constitute and bound fractional sections and the surveyor general had no authority to approve such boundary and hence that neither the surveyed line nor the marsh in any wise limited the area of title carried by the patent.

2. That the premises in controversy, which the Rice survey and plats thereof designated as "marsh" were, at the time of the

Rice survey, in fact a part of Lake Erie and hence not subject to survey and sale by the United States; that the lake was in fact the boundary, and that by the gradual receding of the water, and shore line, of the lake, what was in 1834 a part of the lake has become dry land and appellant as riparian proprietor has derived title thereto as of title by reliction.

3. That if the premises were not a part of Lake Erie they were a shallow lake or pond and the land would belong to the state or to riparian proprietors as the rule of law of the state should determine, and that by this rule of law appellant has acquired title.

4. That if the premises were neither a part of Lake Erie nor a lake or pond, but "a body of low swampy land, partly boggy, partly dry", or in other words "a marsh", there was no water line to limit the grants in the Bailey patents, and they would be limited only by the lines of the sections extended as the Marston survey extended them.

ARGUMENT.

1. As to matters of fact in dispute.

If and so far as the submission of this case may be fairly regarded as presenting questions of fact that are debatable, it seems to us preferable to deal with those questions of fact before proceeding to consideration of the rules of law applicable to them.

We therefore first give attention to such matter of the brief of appellant's counsel as has reference to the contention on her behalf that the premises in controversy were at the time of the Rice survey (1st) a part of Lake Erie; (2nd) a shallow lake or pond or (3rd) that there was no water line to limit the grants.

The agreed statement of facts upon which this case was submitted for adjudication and decree, sets forth that the land included in the Rice survey and Bailey patents, had as its northerly line or boundary the tortuous meandering line which it is agreed was actually surveyed by Rice, and the courses and distances thereof specifically and in detail reported by him to the Surveyor General and which was approved by him and correctly indicated upon the township plats which together with the accompanying field notes were certified to the land office where they constituted the basis of the sale and patent to appellant's ancestor Bailey of the fractional sections thereby exhibited and particularly described. Also that the line thus described in the field notes and exhibited upon the plats is identical with the line of the margin of the water of the marsh as it stood at the time of the survey.

The copies of plats and field notes submitted, show that the survey and plats, upon and in pursuance of which the fractional sections were sold and patented, did not simply show a general area of lake, bay and marsh without anything to distinguish substantially each from the other, but on the contrary showed and plainly distinguished what portion was "lake", what was "bay" and what was "marsh", with a well defined and marked shore line at the margin of the lake and between it and the marsh.

The fact is also submitted as entirely undisputed that the water of the lake and that upon the "marsh" was above its usual and accustomed stage at the time of this survey.

It is not disputed or in any wise called in question by any evidence or fact submitted in the case, that at the date of the Bailey purchase and patent, ten years after the survey, the exceptionally high water, existing at the time of the survey, had subsided, and that the land in dispute was as manifestly then as at the time it was claimed by the state of Ohio, or at the time it was surveyed by Marston, a proper subject of survey, sale and patent.

The brief of appellant's counsel does not make plain, to us, how the fact, if it be a fact, that this lake shore or beach washed shoreward sufficient to reduce the area of the "marsh" from 6000 acres in 1834 to 4700 acres in 1881 affords any support for appellant s contention that the 6000 acres was in 1834 a part of Lake Erie rather than the mere "marsh" that surveyor Rice reported it. The stipulation of fact, to which the counsel refers, is that

"A comparison of the survey made by Ambrose Rice in 1834 and 1835, with that made by John B. Marston in 1881, indicates that Sandy and Crane Islands washed somewhat shoreward during the period intervening between the making of said respective surveys".

We invite attention, however, to just what the comparison of the maps does show and submit that it does not indicate change to anything like the extent that appellant's counsel claims.

To us it seems manifest that the figures 2500, 1500 and 2000, respectively set forth as the number of acres claimed in behalf of the state of Ohio in these three townships, were thus stated in round numbers without any attempt at approximate accuracy.

Nor is there anything to indicate that the entire difference, whatever it is, is referable alone or mainly to the distance which the beach or shore of the Lake may have encroached or advanced shoreward upon the particular portion of theshore line mentioned in this stipulation.

This body of marsh land has on lake and bay all told about twelve miles of shore line, of which nine and one-half miles is at right angles with, and fronting against the course of the strong winds which all the facts in the case show to be productive of the high water which causes temporary inundations of this land, and thus gives it character as a marsh.

If the claim and argument of appellant's counsel based upon the mere discrepancy between the number of acres stated in Ohio's claim of this as swamp land, and Marston's survey of it as 4900 acres, instead of 4700 as the counsel states it, needs any answer, we think appellant's counsel has himself furnished a complete one in the first paragraph on page 16 of his brief:

"It is a matter of common knowledge that the loss incident to having such a neighbor is not small. As an illustration of this self evident fact, it may not be improper to state that nearly half of the land inside the meandered line, in sections 19, 20 and 21, bordered by this aggressive and irresistible neighbor as shown on

the plat, given in the opinion of the Court, page 50, patented to Margaret Bailey at the same time as the eleven involved in this suit and paid for by her, have been washed away and are now part of Lake Erie."

Reference to the plat, printed record opposite page 46, shows these sections 19, 20 and 21, as containing 1394.73 acres with a shore line of three miles on Maumee Bay.

This bay shore, as all of the plats show, is very much protected by Cedar Point and the land in controversy, from the washing by waves driven by winds that come from the direction to cause high water.

Yet if 600 acres, much less than half of this 1394 acres, included as up land in the Rice survey, have been washed away and become a part of Lake Erie, or Maumee Bay, the average distance that this three miles of beach or shore line has been washed shoreward is more than one hundred and sixteen rods. It occurs to us that these changes of position or locality of shore line do not in the one case more than the other, and do not in either case, tend to establish that surveyor Rice committed any error in the respective classifications of what he did classify and separately distinguihs as "Lake", "Bay" and "Marsh".

The suggestion on behalf of appellant as to what she has lost by encroachment of the lake, is, as we suppose, made to illustrate how one subject to loss by submergence should be held entitled to gain by accretion or reliction. In fact, however, as it seems to us it serves but to illustrate the absurdity of appellant's contention. If the condition of appellant's dry land had merely become a marsh or swamp would any one contend that she had thereby lost title to it? And upon what reason can it be urged that appellant has acquired title to this "Marsh" merely by reason of the fact, if indeed it be a fact, that the land has less the character of marsh and more the character of dry land than it had at the time of the Rice survey.

If this body of "Marsh" land was indeed a part of Lake Erie, or was not in fact a "Marsh" and as such manifestly and readily distinguishable from the "Lake" or "Bay", we are afforded no reason why Rice did not designate it as lake or bay instead of "Marsh"; no reason why the state of Ohio demanded it as swamp land, and no reason why the United States Land Department did not in answer to that demand say that what was demanded was land underlying the lake or bay. The persistent claim of this land by the state of Ohio as swamp land and the equally persistent rejection of that claim by the United States Land Department, by every fair intendment signified that the United States claimed the right to control and deal with and concerning the land as United States land; and not that upon any hypothesis it was already the property of the state of Ohio with the disposal of which the United States had no concern and nothing to do.

Conceding, for the sake of argument, that a body of land bounded upon one side by the open water of lake or bay, and upon

the other by "Marsh", or "a low, swampy body of land, partly boggy, partly dry" is not commonly called an island, does not lead to the conclusion that the marsh by which it was in part bounded was lake or bay and not marsh. In so far as this seeming inconsistency cuts any figure it goes to indicate that the error, if any, committed by surveyor Rice consisted in calling that island which was not with substantial permanency island; and not in designating as "Marsh" and not lake or bay that which manifestly was not lake or bay but a "Marsh" subject to occasional and temporary inundation.

Nor, for the purpose of the inquiry here, is the body of land in controversy any the less a "Marsh" and as such clearly distinguishable and distinguished from the lake, merely because the water temporarily standing upon it, and by which it was temporarily inundated, was for the time being by either wide or narrow passages directly connected with the open water of the lake.

An answer to whatever of difficulty is presented by the proposition of appellant's counsel, that this "Marsh" was improperly so called in the Rice survey because "An island does not mean a body of land with water on one side and a low swampy body of land, partly boggy, partly dry" on the other, has been furnished us by the same counsel in language as apt, forcible and pertinent to the case in hand as could be desired.

In the brief filed by him in the Supreme Court of Ohio, on behalf of appellant's ancestor James, in the case of James v. Howell, on page eleven of the brief he says:

"We therefore submit the following as our conclusions of uncontested facts:

"1. That the so-called islands were not in fact such, in any usually recognized sense. In the aggregate, they were about seven miles long. Sandy Island, by survey and estimated quantity, is exactly one and a half chains or six rods wide from end to end, while Crane Island is only one chain, or four rods wide from end to end. It is not known that there ever was, and certainly there is not now, any channel between the sand ridges and the meandered lines of Rice's survey of the James lands".

"2. That these said ridges, so-called "Islands", constitute the beach, or shore proper, of Lake Erie, composed almost exclusively of pure sand".

And again on pages 22 and 23 of the same brief he says:

"We have already said that the proof clearly shows that there is no channel, but only a flag marsh between the so-called "Islands" and the main land or meandered lines. They are not bodies of land surrounded by water, nor were they so when the survey was made, for as often as Mr. Rice refers to it, whether as being in front of the main land or back of the so-called "Island", he calls it a "Marsh" or "marsh inaccessible" and in no instance does he call it a channel."

Nor, we submit, does the fact that the commissioner of the land office gave as a reason for the rejection of Ohio's claim of the land under the Swamp Land Act, that it was "not swamp", tend to

at all establish the contention of appellant that it was theretore "Lake" or "Pond" and not "Marsh".

The words "Marsh" and "Swamp" are each, like many other words in the English language, in that they are used in different senses and to convey different meanings. The sense in which the word is used, the meaning intended to be given it, is to be sought in the context or associated words. Webster defines the word "Marsh", as "A tract of low land, usually or occasionally covered with water, or very wet and miry, and overgrown with coarse grass, or with detached clumps of sedge; a fen. It differs from swamp, which is merely moist or spongy land, but often producing valuable crops of grass". The word "fen" here given as a synonym of "marsh" he defines as "low land overflowed, or covered wholly or partially with water, but producing sedge, coarse grasses or other aquatic plants; boggy land; moor; marsh". "Swamp", he defines as, "Spongy land; low ground filled with water; soft, wet ground; marshy ground away from the sea-shore; land wet and spongy but not usually covered with water".

Johnson's Farmers Encyclopedia defines "Marsh" as, "A flat surface, the soil of which is so far saturated with water throughout the year as to be unfit for culture by the spade or plough; but not so much as to prevent it from producing grasses, and other kinds of herbage. Marshes are generally situated in bottoms, where they are kept moist by the water which descends from the surrounding lands; or along the banks of rivers or lakes, where their humidity arises from their being nearly on the same level with the adjoining water".

The same author defines "Swamp" as "Ground habitually so moist as not to admit of being trod by cattle, but at the same time producing particular kinds of trees, bushes and plants. A swamp differs from a bog and a marsh in producing trees and shrubs, while the latter produce only herbage, plants and mosses. In autumn and spring the exhalations from swamps are productive of agues, consequently it is important to fill them up or drain them".

The character of the land to which the Swamp Land Act had reference and which congress by its enactment intended to provide for transfer of, to the state in which it was situated, is clearly indicated by the purpose of the transfer as stated in the Act and the direction contained in the Act, as to how the proceeds arising from the sales of the lands should, so far as necessary, be applied and used. That purpose was to enable the states to reclaim the land by drainage and levees to prevent overflow; and this purpose was to be carried into effect by the application to it, so far as necessary to accomplish such reclamation, of the proceeds arising from the sale of the lands.

United States v. Louisiana, 127 U. S. 152.

This marsh was not at the time of the Rice survey, nor at the taking effect of the Swamp Land Act, and is not now susceptible of reclamation from their humidity arising from their being nearly on the same level with the adjoining water of the lake,

nor from temporary inundations by the waters of the lake, otherwise than by permanent and substantial lowering of the waters of the lake, or prevention of the gales from the north east rolling its high waves upon them; either of which is a project the Swamp Land Act did not contemplate being committed to the state.

Hence the decision of the Commissioner of the Land Office and the reason given by him for that decision, in rejecting Ohio's claim of the land as swamp land, in so far as it related to the character of the land, meant simply that in his opinion the land was not so situated as to render practical its reclamation by drainage or by protection from overflow by levee, and hence that, in his opinion, it was not swamp land within the meaning of that act.

It did not by any fair inference mean that he disputed or called in question the accuracy of the survey, report and plats of surveyor Rice and the Surveyor General in designating the land as "Marsh", and as such clearly distinguishable from the adjacent "Lake" and "Bay".

We cannot think further comment necessary to render plain and clear, the fact, as shown by every item of evidence and of agreed fact upon which this case is submitted, that the body of land in controversy here, was, at the time of the Rice survey, and ever since, a "Marsh" as surveyor Rice designated it, as surveyor Marston more generally and fully described it; and, as the Circuit Court of Appeals in a few words characterizes it, "this low, swampy body of land, partly boggy,. partly dry, and sometimes subject to temporary inundation".

DISCUSSION OF ABSTRACTIONS MAY PROPERLY BE IGNORED.

In the case of Bates v. Railroad Company, 1 Black Rep., page 204, this court, speaking by MR. JUSTICE CATRON, says:

"In regard to the matter so much and so ably discussed in in the argument here, as to the rights of proprietors on the lake shore, where their fronts were swept away by currents, and to what extent they still owned the lands covered with water, undoubtedly theirs before the decrease took place, we do not feel ourselves called on to decide, because this plaintiff was not the owner of the land sued for before the decrease occurred, and could have no proprietary rights in the bottom of the lake. Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore; and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless".

For like reason we cannot deem it desirable that we here answer in detail propositions of appellant's counsel, and arguments in support of propositions, which are at most but interestingly speculative, in that they do not pertain to any matter of fact having even a shadow of foundation in this record.

We are unable to regard otherwise appellant's propositions

that if the premises in question were not a part of Lake Erie they were a shallow lake or pond; and if not this there was no meanderable water line to constitute a boundary or limitation of the grants to appellant; and that the boundary being Lake Erie, as the lake receded her boundary line correspondingly advanced.

Courts are not called upon to and do not, by virtue of or in the exercise of their jurisdiction and authority as courts, consider or construe statutory provisions, or declare rules of either statutory or common law, in the abstract; but, having regard to the facts before them, judicially announce and administer the rules of law, whether of statute or of common law, applicable to and governing the rights of the parties before them, founded upon those facts.

OPERATION AND EFFECT OF PATENTS TO BAILEY.

The question as to what land the United States parted with title to, and thereby vested title to in its grantee Margaret Bailey, must necessarily be determined by the application to the facts and circumstances of the particular case, of the rules of law under and in pursuance of which the patents issued, and those rules of law thus applied must furnish the guage whereby is to be measured the legal effect of the patents, as affecting the rights of grantor and grantee.

In so far as appellant contends that the Rice survey could not have been lawfully made, approved and acted upon, and such action sustained upon any other hypothesis than that the premises designated as "Marsh" were in fact part of Lake Erie and as such omitted or excluded from survey, or some other such lake or pond as should, by the rules of law governing such surveys, have been omitted or excluded from such survey, the entire controversy, and this part of it, none the less, depends upon the construction and application of the rules of law under which these things were done, to determine whether what has been done is susceptible of being given the effect claimed for it, and if not, whether it would for that reason be deemed in whole or in part, and, if any, what part nugatory or ineffective.

FEDERAL GOVERNMENT HOLDS TITLE AS TRUSTEE.

The principle that lies at the very threshold, that must be regarded from the beginning to the end, in the construction of United States patents, is, that the government is regarded as having taken title to the public domain in trust for the people.

Howsoever the United States shall have acquired the title, it is deemed to hold that title in trust. Navigable rivers and lakes and the lands underlying them it is deemed to hold in trust for the whole people in so far as relates to their right to the use thereof as public highways; and for the state that shall be organized, so far as relates to any private ownership, subject to and consistent with the enjoyment of the public easement, except so far as such right of private ownership may be effected by conveyances

prior to the formation of the state; thus leaving the state to determine whether such private ownership shall or shall not be permitted, and the extent to which and terms upon which such private ownership shall be acquired and held; and whether, and the extent to which, such private ownership, control and use shall be independent of or incident and appurtenant to that of land abutting such stream or body of water.

Lands outside of those thus subject to the right of public easement, reservation, or previously acquired private rights, the Federal Government is deemed to hold in trust to dispose of by such method, previously prescribed by legislation, as shall best subserve the interests of the entire people.

This trust is to be recognized in the interpretation and construction of the laws providing for the survey and sale of the public land, and of the patents issued in pursuance of such laws, surveys and sales.

The necessities of the case must be deemed to contemplate the lodging and vesting in some tribunal, board or officer the duty of ascertaining what part of the domain to which the general government has thus acquired title, shall be regarded as falling within the one classification and thus subject to the trust imposed upon *it*, or within the other classification and subject to *its* trust incidents.

If the question arises between the Federal government or its grantee, and one of the original states or its grantee, concerning domain surrendered by the state to the general government, the question presented would involve the determination of the extent to which the state had surrendered its properties, rights and franchises to the general government, and this would be determined by the construction of the instrument or instruments by which that surrender had been consummated.

The question arising between the general government or its grantee and a state subsequently organized or its grantee concerning public domain within that state, depends upon the interpretation and construction of the constitution of the United States, and laws enacted in pursuance thereof, whereby the subsequently organized state is placed upon an equal footing with the original states; and, would involve, though from a different standpoint, the same consideration, viz: what of the public domain within its borders was of the character to stand charged with the public easement, and, subject to that charge, to be deemed at the disposal of the state for private ownership, control and use, in so far as these should not interfere with the enjoyment of the public easement; and, what within other classifications.

The tribunal selected for the determination of these questions and the method by which they are to be determined as applied to the facts and circumstances in any and every instance, is that of the land department of the general government, and its method of ascertaining the facts and conditions to which are to be applied the rules governing the trust, is by actual survey of the public domain under authority and direction of the surveyor general, the

making by him of plats showing such survey and his certification of the survey, field notes and plats to the chief officer of the land department, and his approval and authentication thereof, and publication thereof at the offices where the lands are exposed to sale, as constituting the foundation of patents.

In the discharge of the duty thus imposed upon it, the land department proceeds in pursuance of rules prescribed by acts of Congress, passed by authority conferred by the constitution. It is sufficient for the purposes of this case to say that in the absence of obvious mistake or positive wrong the determination of that tribunal upon the subjects and questions thus committed to it is to deemed final and not subject to review by the courts.

Johnson v. Towsley, 13 Wall, 72.
French v. Fyan, 93 U. S. 169.
Ehrhart v. Hogaboom, 115 U. S. 67.

Any attack upon or inquiry as to the propriety or validity of the action of the land department or its agencies in and about the survey and classification of the public domain must of necessity involve and constitute an inquiry as to whether the department and its agencies have proceeded in substantial conformity to the rules prescribed for their action and conduct by the enactments of Congress providing therefor, and whether the classification concluded upon was made in the exercise in good faith of the powers conferred by these enactments, and in substantial conformity to the rules that they prescribe. Indeed no other source could be looked to for light whereby to determine the issue presented.

No evidence has been offered tending to show that the classification of the premises in question as "flag marsh" instead of river or bay, or lake was in any wise erroneous. By whatsoever exigency such classification might be made the subject of attack the question as to its accuracy would still be determined by the application to the particular facts and circumstances of the rules of law governing the action and conduct under review, and in the light of the rules of law by which should they have been governed. That is, such would be the inquiry in so far as the court should deem evidence presented in support of it admissable or pertinent.

McCormick v. Hayes, 159, U. S , 332.

FEDERAL GRANT IN EXECUTION OF TRUST TO BE CONSTRUED STRICTLY. NOT EXTENDED BY IMPLICATION.

While the title of Federal Government is more absolute than that of the individual can be, it is a trustee rather than an owner in its own right; and, recognizing that, as the foundation upon which its grant is based, from which its authority to grant arises, the same rule does not apply to it as does to the grant by an individual owner, in this: that whereas the individual owner in making his conveyance is regarded as the party who has selected the words

by which he defines the extent of his grant, and the rule applicable to him is the rule generally applicable to that party who is regarded as the sole source of the expression or wording of the obligation that he assumes, and is that it is to be construed most strictly against him, and in favor of the party taking under it. The opposite is the rule that the authorities uniformly recognize as applicable to the grant by the general government. Being the holder of the title in trust, it is regarded as using the instrument selected by it, the patent, as one of the methods of carrying into effect that trust; it is regarded as, by the patent it issues, disposing of, in the execution of this trust, just what that patent specifies and no more. And some part only of the patent is not to be looked to, some part only of the description is not to be looked to, but the whole patent, as well for limitations upon the grant, as for the description of the grant itself. And so, where the patent refers to a plat, that plat is to be regarded as a part of it, the same as if embodied in it. In like manner the quantity stated in the patent while when stated in the deed of an individual grantor is regarded as mere matter of description—something by which the premises are to be identified—but not a limitation upon the quantity or an extension of the quantity, merely one of the incidents of description as it might be termed; while in the government patent *it* is to be regarded as matter of essential description.

In *Shively v. Bowlby*, the question was whether a patent describing the land thereby conveyed as bounded by the Columbia River passed title to land below high water mark. *Mr. Justice Gray*, delivering the opinion of the court thus announces the rule pertaining to the construction of grants by the United States:

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs the private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away'. The Rebeckah, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect."

"The decisions of this court referred to at bar, regarding the shores of waters where the ebb and flow of the tide from the sea is not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of Congress relating to such waters".

"Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States".

152 U. S., 1, 10, 31, 58.

VALIDITY AND EFFECT OF RICE SURVEY AND PLATS.

The legal effect of the Rice survey, the report of that survey and the plats thereof by the surveyor general to, and their approval by the Commissioner of the General Land office, and the sale of the "fractional sections" thus surveyed and platted, and the issuance and delivery of patents therefor, of the form and character shown herein, is to be ascertained and determined by the construction of the provisions of the United States statutes under and in pursuance whereof the survey and plats were made and approved and made to constitute the foundation of the sale and patent of the "fractional sections", and the application to these transactions and facts of the rules of law which those statutory provisions, so construed shall be found to prescribe.

The Rice survey included: 1st, The Surveyed land to the margin of the "impassable water and marsh", the boundary of which surveyed land is correctly indicated by the line, the legal effect of which is in question herein; and, 2nd, The Islands some nine and one-half miles in length bordering the Lake and separating the lake and the marsh, except at three shallow inlets a few rods each in width.

Under and in pursuance of the Rice survey plats thereof were made by the Surveyor General and by him certified together with the field notes of the survey to the Commissioner of the General Land Office; the Commissioner approved the survey and plats and duly authenticated copies thereof were forwarded to the land office at Bucyrus to be there exhibited to proposed purchasers of the premises surveyed.

The plats showed the sections bounded by the line in question as being, not square sections but "fractional sections"; not abutting upon a navigable stream or any stream, nor upon any navigable lake or any part or parcel of a navigable lake, or lake of any sort; but upon an area designated as "marsh".

Upon the information thus given these fractional sections were sold, and the patents thereof issued and delivered to Margaret Bailey.

The patent in each instance in and by which title was conveyed mentioned the section as being a "fractional section", stated the number of acres it contained, with the recital "according to

the official plat of the survey of said lands returned to the general land office by the Surveyor General".

By means of the plat, thus effectively made a part of each sale and patent, the designation thus given to this intervening space constituted affirmative notice to the proposed purchaser and patentee, and to whomsoever should succeed to the title evidenced by the patent, that this unsurveyed area was not in any wise a part of any stream or body of navigable water, and that it was not a part of any such body of water as, standing charged with the public easement, it has been and is the policy of the United States to leave to the state the determination of the extent or degree to which, and means by which the underlying land may be the subject of private ownership.

MARSTON SURVEY AND PATENTS UNDER WHICH APPELLEE CLAIMS TITLE.

By means of the Marston survey, duly approved by the proper authority, the area which upon plats of the Rice survey was designated as "marsh" was surveyed and divided into sections, thus establishing eight new fractional sections aggregating 1667 13-100 acres, no part of either of which sections appeared upon or was included in the Rice survey, or the patents issued thereunder. By that survey also the lines of the eleven "fractional sections" of the Rice survey were in regular course extended over said intervening marsh, whereby in the aggregate an additional 3234 77-100 acres was included in these eleven "fractional sections"; the total area of the flag marsh being 4901 90-100 acres.

Under and in pursuance of this Marston survey the 4901 90-100 acres of land included therein was sold by the United States at public sale, for a consideration aggregating more than $20,000, and patents thereof made and delivered to Hanna and Lacourse under which patents and conveyances by the patentees, appellee claims to have derived title to this 4901 90-100 acres of land.

It being submitted and undisputed that the land department proceeding upon the theory that the reasons upon which this territory had been omitted from the sectional subdivisions of the Rice survey did not preclude its being surveyed as undisposed of United States Government land, had caused it to be surveyed, approved the survey, sold and gave patents purporting to convey the land; it would seem but fair that the party attacking the validity of this procedure of the land department should establish by evidence the facts relied upon to impeach it.

However, as we find the case submitted for determination, not upon the evidence, but rather in spite of the evidence, the appellant contends that this area which Rice did not survey was in fact part of the Lake, because if it were not, Rice was without authority of law to establish a line which sober husbandmen have experienced so much difficulty in keeping the right side of.

Supposing the conduct of surveyor Rice in this regard

to have been irregular, and that the proper discharge of his duty would have required the survey into sections and proper subdivisions of sections of this "flag marsh", his failure to do this, and returning his survey as he did, cannot change either the character of the property or the ownership thereof, nor result in carrying to a patentee of the surveyed land title to that which should have been surveyed but was not.

We cordially coincide with the statement of appellant's counsel that:

"The Government made this plat to show what land it had for sale. Both parties accepted the plat as giving the truth as to what was lake and what was land, the sale was made and the plat was made part of the conveyance, and neither party can be heard to question it."

We beg to add right here the observation that the Government made this plat to show also what was "Marsh". Both parties accepted the plat as giving the truth as to what was "Marsh" and that the fractional sections bordering it, did not border upon "Lake" or "Bay", or any body or stream of navigable water, but upon "Marsh", and "neither party can be heard to question it".

THE RULE OF LAW AS TO MEANDER LINES.

In the presentation of this case we unhesitatingly concede to its fullest extent as well established, and founded upon sound reason, the rule that where surveys and plats of public lands show fractional sections having as their boundary streams or bodies of navigable water, a meander line purporting to indicate and follow the margin of *such* waters, is not, and *such water line* is the boundary. We do not desire to in any whit question the force or integrity of this rule, nor that any limitation be imposed upon it. That the scope of the rule is as here indicated the authorities cited by opposite counsel clearly enunciate.

"The meander lines run in surveying fractional portions of the public lands *bordering upon navigable rivers*, are run, not as boundaries of the tract, but for the purpose of defining the siuuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser".

Railroad v. Schurmeir, 7 Wallace, 272.

"It will be observed that the government surveys made in 1834-5 upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake'; and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'Navigable lake', although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. * * * *

"It has been the practice of the government from its origin,

in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of *such* waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to *such* meander lines. It has frequently been held, both by the Federal and state courts that *such* meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary."

Hardin v. Jordan, 140 U. S. 371.

"In this case the United States Surveyors obviously surveyed the plaintiff's lot only to a *bayou* which they called the Indian River, leaving a tract between the bayou and the river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the *bayou was not* the Indian River or *a proper water line* on which to bound the lots."

Horne v. Smith, 159 U. S. 40.

Under the statute, the meander line, such as that statute contemplates might be run at the intersection or upon the margin of navigable water. There is no evidence here tending to show that the surveyor or anyone having to do with survey or plats, regarded this marsh as navigable water or a part of any body, stream or channel of navigable water; on the contrary, although adjoining the lake and bay they definitely distinguish it from both; it is not the lake, not the bay — it is a marsh. For the time being the water was perhaps too high for the surveyor to actually survey and properly mark the lines and corners for proper subdivision of it at the time, but whatever the reason of it was, everything in evidence here shows the absence of that sort of condition that would have warranted him in making that a meander line that should evidence that the government proposed not to regard the land beyond it as public land for future survey and disposal. In line with this is the claim and contention and the theory of the government itself as shown by the circular put in evidence, that where for temporary reasons ground covered by water, *not a part of a body or stream of navigable water* was meandered instead of being surveyed out, such land was regarded as government land, not parted with and the right of the government retained to survey it, when the time should come that it should be a proper subject of survey, to the end that it might be disposed of in the discharge of the trust imposed upon it in the hands of the government. So that was the condition of affairs that Mr. Rice had to deal with when making this survey, and upon the showing made here we contend that he did just what was his duty to do. Being unable to survey this marsh land at the time he ran the boundary line between it and the land that he did survey. The plat was made by Mr. Surveyor General Lytle, showing the contents of the fractional sections; it was fractional sections that were disposed of, their contents were named, and the patent referred to the plat which with its marginal

field notes shows exactly the lines actually ran and surveyed bound ing each of these fractional sections.

And, following that, it appears by the patent issued to Margaret Bailey, that her patents were issued in pursuance of purchase made at the General Land office at Bucyrus. At that office of course they had this plat, or a proper authenticated copy of it, to which a purchaser might refer, and undoubtedly did refer, for the purpose of ascertaining just what was the situation of the land which he or she proposed to acquire a deed of, or proposed to bargain for; and that plat and field notes show these facts, that there were, not lines run merely for ascertaining quantities, but lines actually surveyed, posts planted, by which the corners were fixed, as well between these sections, fractional sections, at the intersection of their straight section lines, with the meander line, as at other proper places for posts or definite monuments, to mark their corners and the boundary not the line of or margin of a body or stream of water, but of a marsh. All of this was open to the purchaser, so there is every reason for the application to the case of this rule that the government is not to be regarded as having parted with more than comes fairly within the description of the metes and bounds and the quantity specified in its patent. That rule gives to the purchaser just what, with his eyes open, he is furnished every possible information that could be desired to vest in him perfect knowledge of all, and he knows just what he bargains for. While to apply the opposite rule to it would be to say the government is to be regarded as having parted with what it in no wise sold and in no wise purported to convey.

The case of Barnhart v. Ehrhart, 54 Pac. Rep. 195, decided in August, 1898, by the Supreme Court of Oregon, affords an apt recognition of the application and reason of the rule of law which is in all fairness applicable to and decisive of the rights of the parties in the case at bar. The survey under which patent issued to Barnhart, should have had as its southern boundary Wild Horse Creek, which constituted the northern boundary of the Umatilla Indian Reservation. The survey showed as its southern boundary the meandered line of "the dry bed of a creek". The plat of the surveyed territory north of this boundary showed the division of the fractional section into lots, and patents were issued for the lots, "according to the plat" and called for the number of acres designated upon the plat.

It was subsequently ascertained that although Wild Horse Creek intersected the section lines at the points designated in the survey, it diverged, between those points, in the opposite direction from the surveyed line, thus leaving a tract of more than one hundred and fifty acres between the surveyed meander line and Wild Horse Creek. Plaintiff claimed, as appellant here claims, that a line, not specifically authorized by the statute under which the survey was made, was not entitled to recognition as a boundary or limitation of the Government's grant, and, that his title extended to the authorized boundary of the survey.

"As tending to support defendant's theory of the southern

boundary of said lots, his counsel requested the court to give, among others, the following instructions to the jury, which it refused, to-wit: "I instruct you further that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of Wild Horse Creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact meanders the stream, under the laws of this state, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint.' In making the original survey of public land bordering upon arms of the sea, lakes, and navigable rivers, the surveyor is required to run meander lines for the purpose of fixing the general average of the sinuosities of the shores or banks of such bodies or streams of water as a means of ascertaining the area of each tract the contour of which is rendered irregular by such obstacles, and from the field notes of the survey an official plat is prepared, which, when approved by the surveyor general, usually represents the meander line as the border of the water and demonstrates that the water course or body of water and not the meander line as actually run on the land, constitutes the boundary thereof. Railroad Co. v. Schurmeir, 7 Wall. 272: Hardin v. Jordon, 140 U. S. 406, 11 Sup. Ct. 808, 838. But when, for any reason, the surveyor omits to include large tracts of land lying between the meander line as surveyed or pretended to have been run upon the ground and such streams or bodies of water, the patents for the lots, though referring to the official plat of such survey for identification, are not equivalent to a conveyance of the premises to such navigable stream, lake, or bay, but are grants limited by such meander line. Fulton v. Frandolig, 63 Tex., 330; Granger v. Swart, 1 Woolw. 88, 90, Fed. Cas. No. 5685; Lammers v. Nissen, 4 Neb. 245; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303; Glenn v. Jeffrey, 75 Iowa, 20, 39 N. W. 160; James v. Howell, 41 Ohio St., 696; Shoemaker v. Hatch, 13 Nev. 261; Martin v. Carlin, 19 Wis. 454; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286; Ayres v. Watson, 137 U. S. 584, 11 Sup. Ct. 201. Tested by this exception to the general rule applicable to the survey of public land, we

think defendant was entitled to an instruction illustrative of his theory of the case; and, this being so, inasmuch as the court did not embrace the subject in its general charge, it erred in refusing to give the first instruction requested."

Upon this subject the case of Granger v. Swart, Woolworth's Circuit Court Reports page 88 is instructive. The case was tried before Justice Miller. The point decided is well stated in the syllabus as follows: "The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.

"If, at the date of an entry of government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterward formed belong to the party holding title under the entry.

"But, if at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry".

This is our case exactly as shown by the agreed statement of facts. Throughout this marsh, while there were places where there were pond holes, and it was cut up by channels more or less, there were other portions of it that have always been so that grass might be cut upon them; just what the maps and descriptions set out, characterized them, as being lands of a marshy character, not the lake, not the bay, and not navigable waters. Upon the same subject is the case of Lammers v Nissen, et al, 4 Nebraska, 245. The second clause of the syllabus is: "Although as to public lands of the United States, a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *aliunde*. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government.

"An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of a river".

Instead of being like ours, as showing not the lake or bay, but a marsh, in this instance, the meander line purported to be along the bank of a river; but, notwithstanding that, the court held that evidence outside the record might be shown to show that as a matter of fact the meander line did not follow the sinuosities of the river.

On page 246 of the report of the case is a plat showing the river, and showing the meander line. The party owned that lot "1" and he claimed as does the defendant here that having gotten that lot he got a mile of territory between it and the river. On page 251 the opinion proceeds: "Again another inquiry involved in the consideration of the case is as to what is the effect which a meander line, purporting to have been run along the bank of a stream, may have in regard to land at the time lying between it and the bank of a stream, and remaining unsurveyed. And in respect to

this inquiry, I think it suffieient to observe that as to public lands of the United States, conceding the rule to be well settled that a meandered line bordering on the bank of a stream, is not to be considered the boundary of a tract, but simply as defining the sinuosities of the bank of the stream and as a means of ascertaining the quantity of the land in the fraction subject to sale, yet the question whether such line does in fact define the sinuosities of the bank of the stream or not is one which may be determined by evidence *aliunde*. The mere fact that it is run and is designated upon the plats as a meandered line, certainly cannot be conclusive in the matter. To establish the doctrine that such meander line is conclusive would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream; it would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well settled rule of law defining what is an accretion to land."

"In Granger v. Swartz, supra, the principle is enunciated that if between the meander line, by which the government survey was made, and the bank of the river, there is, at the time, a body of swamp or waste land or flats, on which timber and grass grew and horses and cattle fed, then the patents for the lands surveyed would not cover this land, but must be continued to the actual limits of the meander line, and include no more".

The same principle is held in the case of James v. Howell 41 O. S., 696. The syllabus of that case is: "Ordinarily the meander lines run in surveying fractional portions of the public lands bordering upon navigable waters, are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, or lake, and as the means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

But when the government survey, field notes and plat show that a meander line was run as the border, or boundary, between fractional sections and a marsh, and that the solid ground between the marsh and a lake was surveyed, meandered and platted as an island, with its acerage separately computed, and marked by township and not by section, the first named meander line is the boundary of the marsh. The fractional sections do not include any part of the ground surveyed, meandered and platted as an island".

ONE CANNOT CLAIM TITLE UNDER A PATENT ISSUED PURSUANT TO A SURVEY AND AT THE SAME TIME QUESTION THE VALIDITY OF THAT SURVEY.

While the statute does not in terms provide for every detail, does not recognize the propriety of meandering lands such as these

were, while what the statute does provide for meandering is navigable waters, and the proper place for a meander line as contemplated by the statute would be upon the line of the navigable waters, the principle is as well recognized as any rule of law, that a party cannot claim under a survey, and at the same time call in question the validity or integrity of it. This defendant Gertrude Niles, claiming through a patent issued to Margaret Bailey, is claiming fractional sections; the patent issues to her for fractional sections; if there was not a survey such as the government might or could recognize there were no fractional sections to sell; this survey was either good for some purpose—or else it could not lay the foundation for any right. These subsequent purchasers are no more chargeable with notice of the limitations of the authority of the officers of the government than was Margaret Bailey the original purchaser. All alike must take notice of the law in that regard; but, if the survey was sufficient so that the proper officers might approve it, might prepare plats in pursuance of it, might put the lands to public sale under and in pursuance of that survey, and relying upon it for descriptions, and the purchaser bought and took title by patent under and in pursuance of that sort of survey, it does not seem as if it would quite lie in the mouth of that person to say that instead of a fractional section consisting of 23 or 24 acres he got a full section of 640 acres, because forsooth this line that would bound the fractional section was not surveyed in persuance of authority of law. The survey upon which appellant relies for title must either be deemed of sufficient validity to constitute a proper foundation for the action of the government officers who put the land on sale or else it was not of value to carry title. This subject came before the Supreme Court of the United States in the case of Brown v. Clements, in 3 Howard's Reports, a case dealing not with navigable waters but with previously acquired private rights. A plat in connection with the case shows the entire section and shows in the north west quarter, north east quarter and south east quarter the parts of the section that had been disposed of by a private right acquired in them prior to the survey. A survey was made and a portion of the section undisposed of consisting of the south west quarter, the southerly part of the north west quarter a portion of the south west corner of the north east quarter and the westerly part of the south east quarter, containing in all 203 17-100 acres. The surveyor general divided that so as to put 92 and 67-100 acres in the west fraction and 110 and 50-100 acres in the east fraction which was so held and patented, but the patent instead of describing the west 92 and 67-100 as being the south west fraction of the section or as the west fraction of the south part of the section, described it as the south west quarter of the section, containing 92 and 67-100 acres and then a separate patent issued for the other 110 and 50-100 acres; the party who thus had the patent describing the southwest quarter as containing 92 and 67-100 acres claimed that the government authorities had no right to limit him to less than the quarter section. The tract was in such shape that an entire quarter section could

be aparted out of it but left the other fractions in bad shape for disposition. The surveyor general supposed he had a right to divide it as he did. A majority of the court held the party entitled to the entire quarter; that the 92 and 67 100 acres although purporting to be the quantity were not controlling, that in the patent describing the quarter section he took the entire quarter section. Three judges dissented, and in the 20th Howard, the case of Gazzam v. Phillips, et al, page 372, the question again came before the court with the result that the court unanimously followed what had been the dissenting opinion, in the last case, and held it did not lie in the mouth of a patentee to impeach the integrity of that survey, and that he took nothing beyond the subdivision as shown upon the plat containing the 92 and 67-100 acres. So that the rule laid down in the dissenting opinion in Brown v. Clements in 3rd Howard became the unanimous opinion of the court in the case of Gazzam v. Phillips, and is followed in subsequent cases. There are two cases in 158 United States Reports following this case in 20th Howard, the first is Stoneroad v. Stoneroad, 158 United States Reports, page 240, and the next is Russell v. Maxwell Land Grant Co. in the same volume, page 253. The syllabus of this last case is as follows:

"A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any colatteral attack in the courts".

So then we may, for the purpose of argument, concede that there was no affirmitive authority in the statute for a meander line as the term is commonly known upon this margin of this marsh, and yet that does not help the case of this appellant at all because the principle is still applicable to her patent, the rule of construction applicable to it, that she takes by her patent what it purports to give, and that she cannot claim the validity of the patent, the validity of the survey, for the support of the patent, and that it is invalid as a limitation to prevent her claiming beyond and outside of the patent. The same rule is adhered to in a still later case, that of McCormick v. Hayes, 159 U. S. Reports, page 332, and the syllabus is as follows:

"In an action in which the plaintiff claims title under the act of September 28th, 1850, Chapter 849, Stat. 519, granting to the several states the swamp and overflowed lands in each unfit for cultivation, and the defendant claims title under the act of May 15, 1856, C. 28, 11. Stat. 9, making a grant of lands to the State of Iowa to aid in the construction of railroads, parol evidence is inadmissable to show, in opposition to the concurrent action of the Federal and State officers having authority in the premises, that the lands in controversy were, in fact, at the date of the act of 1850, swamp and overflowed ground. It is the recognition of the same principle that a party cannot be heard in the courts to attack collaterally the action of the departments of the government and their authority and jurisdiction to determine these matters. This survey when made went to the proper officers of the government to be there approved or disapproved by them, if disapproved the

result would be, of necessity, either the resurvey or the correction of that thing wherein the officers charged with the matter found the survey or the report of it not to be such as they could approve. On the other hand, when they did approve it and proceeded to act under it and patents issued under it, it is not a question for the courts, and of which they have cognizance to reverse the action of the land department authorities in those regards."

The designation on the map of this unsurveyed land as a marsh expressly excluded it from the category of lands so covered by navigable water as should be omitted from survey and sale by the U. S. government. It was unmistakably distinguished from both the bay and the lake, and there was no chance for misapprehension because the plat so designated it. The shore line is indicated as well of the bay as of the lake. But even if this had, by mistake, been designated as a part of the lake instead of as a marsh, it would not have helped the claim of the defendant in this regard. Upon that subject we refer to 75 Iowa Reports, page 20, the case of Glenn vs. Jeffery, et al: The second clause of the syllabus is as follows:

"A certain lot was surveyed and platted and located on the north side of a certain water supposed at the time to be the Missouri river; and the government plat and field notes described the meander line as being at said river, but the water was, in fact, a bayou some distance from the river, and between it and the river was land which was never, in fact, surveyed. Held, that the patent for the lot did not convey the land between the bayou and the river."

The opinion of the court on page 21 is as follows:

"The evidence warranted the court in giving the instruction it did. There was no controversy as to the facts. It is true that the government plat and field notes described the meander line as being at the Missouri river, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river, it was run along a bayou some distance from the river. The land in question cannot be regarded as accretion, but existed as it now does when the survey was made. The court rightly directed the jury to find for the defendant. The land never was, in fact, surveyed by the government, and never sold or conveyed to the plaintiff. It is true the meander line is not a boundary line and if the evidence in this case showed that the river had been meandered, this case would be like the case cited; but there is a material distinction between them. In the case cited the river had been meandered and the land in controversy had been formed by accretion since the survey and the sale of the land by the government. It is not claimed in this case that this land has grown up there by changed conditions or anything of that sort, but the claim seems to be that these fractional sections had to find water somewhere and to be extended far enough to reach to the water."

The undertaking of the appellant to support her claim by some application of the doctrine of riparian right, would be

applicable if this purported to be or was, in fact, a meander of navigable water, a meander line, such as the statute contemplates, might properly be made merely for the purpose of ascertaining the quantities, and treating the water line as its constituted boundary; there is, however, an utter absence of anything here showing such a state of affairs as would warrant any surveyor thus dealing with it in making the survey, or any purchaser supposing that was the sort of right the government was giving by its patent. In the case of Grant vs. Hemphill, 59 Northwestern Reporter, page 233, an Iowa case, it is held as follows:

"An owner of lots on a meander line, which was supposed to separate such lots from a lake which, in fact did not exist, does not own the land covered by supposed lake, but it is a part of the unsurveyed domain of the United States."

He claimed that at least he was entitled to have a full section, but it was held that he got just what his patent described to him; and the doctrine was recognized that he could not be held to claim the validity of the survey as the foundation of the right that was given to him by his patent, and call its validity in question as a foundation for claiming more than the patent gave him. The case of Bates vs The Illinois Central Railroad Co. in 1st Black Reports 204, is also an instructive one upon this subject. In that case the survey and plat gave as a boundary line the mouth of the Chicago river, and the patent stated what the quantity was, and was in form as these are; and it appeared that the mouth of the river was at such a point as would include a much larger quantity of land within the boundaries than the quantity stated in the patent and the description; but it also appeared that there was an opening into the lake at that point, which might have been treated by the surveyor as the mouth of the river, and the court held that for the purposes of the survey that was the mouth of the river and the patent could not go beyond that line.

A still later case following this same doctrine is the case of Horn vs. Smith, 159 U. S., page 40, the syllabus reads this way:

"In this case the United States surveyors obviously surveyed the plaintiff's lot only to a bayou, which they called the Indian River, leaving a tract between the bayou and that river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the bayou was not the Indian river or a proper water line on which to bound the lots."

The opinion of the court in that case might well be made a part of this brief, constituting, as it seems to us, an exhaustive and complete refutation of the theories urged on behalf of appellant.

In that case the bordering unsurveyed territory, between which and the surveyed premises the meander line ran, was designated as Indian River.

The natural boundary, which the meander line and plat thus indicated, was, however, subsequently found to be of that which the court, in its opinion, designates as bayou, or savannah, using those terms interchangeably, as either thereof being properly

descriptive of the territory referred to, and the water line of which was held by the court to constitute a boundary, the validity of which, the party claiming by patent in pursuance of the survey, would not be heard to dispute.

Webster defines "savannah" as "a tract of level land covered with the vegetable growth usually found in a damp soil and warm climate—as grass or reeds—but destitute of trees."

This boundary the court held to constitute the limit of the grant, although the patent referred to the plat, which designated the river as the boundary.

If the meandering of the water line of a savannah, and, upon the survey and plat, giving it the name of a river, to which it is adjacent, serves to limit the grant of a patent issued in pursuance of such survey, with what reason or propriety can the validity of such boundary or limitation be questioned, where the plat and field notes correctly designate the adjoining, bounded and meandered, but unsurveyed territory, as "savannah" or "marsh," and in turn designate more remote unsurveyed territory, as "lake" and "bay," respectively.

CASES CITED BY APPELLANT.

Without rehearsing in detail the questions adjudicated or points decided in the several cases presented in appellant's brief, and not herein above referred to, it is sufficient to say that none of them either support the views necessary to her defense nor at all controvert those herein contended for by appellee.

Palmer vs. Dodd, 64 Mich., 475, was unlike the case at bar in that the survey in no wise distinguished between the area of the marsh and that of the lake; Stone vs. Rice, 121 Ind., 53, was a dispute of title to land underlying a lake and not a marsh; Schlosser vs. Crookshank, 65 N. W. Rep, 344 (cited by appellant as 65 Iowa, 34), merely holds that where the meander line and the lake line are not identical the high water line of the lake is the line of the land included in the grant; in attempting to state the holding of the court in Whitney vs. Detroit Lumber Company, 78 Wis., 240, appellant's counsel must have unwittingly gotten the remedy sought and that adjudged very much muddled for the latter was the exact contrary of what the counsel states it; the case, however, is totally unlike this one in that there a manifest grave error had occurred, for there was no lake in the subdivision to fit the supposed meander line; whereas, here the water line of the marsh at time of survey was identical with the surveyed line, the legal effect of which is in dispute. The court held, against the plaintiff's contention, that he could not extend his grant beyond the smallest government subdivision to reach the lake.

If and so far as one derives title by or under governmental authority to land situate within an organized state and underlying either body or stream of navigable water, such title is acquired from and the immediate ancestor in title is the state and not the United States.

If by the state policy ownership of land abutting a navigable stream be deemed to draw to it or carry with it, as incident to such riparian proprietorship, title extending to the thread of the stream, such doctrine of extension of title confers the title of the state, and not of the United States.

It is clear, then, that where the contention is as to whether ordinary high water mark, or the thread, or center line of the stream, is to be deemed the boundary, the question presented for adjudication is not in any sense whether the meander line, if there be one, or the high water mark margin, or thread of the stream, constitute the boundary line of the land patented; but, rather, what, if anything, of the state's ownership and title, outside of and abutting the land patented, of land underlying the stream of navigable water, shall, under the policy of the state, be deemed to inhere and vest in the riparian proprietor as incident to such proprietorship.

The cases of Gavit vs. Chambers, 3 O. R., 495, and June vs. Purcell, 36 O. St., 396, merely announce the rule of state policy as to ownership of land underlying navigable rivers; and in no way involve that of the effect of a surveyed line identical with that of the margin of a "flag marsh."

SUCH RULE NOT APPLICABLE TO A MARSH.

The ground of distinction and the consequent difference of doctrine applicable to a navigable river line and a marsh line is thus stated by the Supreme Court of Ohio, in the recent case of Railway Co. vs. Platt:

"The ground in controversy is insusceptible of absolute and unqualified dominion, being incidental to the shore and subject to the public right to navigate the stream. Because of the permanent character of the riparian and public rights involved, the case is broadly distinguishable from those of grants bounded on streets and highways which may be abandoned, and their sites thus restored to a condition in which they may be subject to absolute and unqualified dominisn. For the same reason the case is distinguishable from those of grants of lands bounded by swamps, ponds and lakes that are not navigable and are subject to drainage."

53 Ohio St., 254.

THE CASE MADE BY COMPLAINANT ENTITLES IT TO RELIEF IN A COURT OF EQUITY.

In support of our contention that the case presented is such as entitles the complainant to relief in equity in the state courts, we invite the attention of the court to a recent decision of the Supreme Court of Ohio, wherein the syllabus thus sets forth the point decided:

"Where numerous acts are being committed, and their continance threatened, under a claim of right, by one person on the land of another, each which act constitutes a trespass, and the injury

resulting from each act is, or would be, trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the owner may resort, in the first instance, to a court of equity for appropriate relief."

Lembeck vs. Nye, 47 O. St., 336.

To like effect is the doctrine as stated in

High on Injunctions, Sec. 700, et seq.

Beach on Injunctions, Sec. 1136,

and cases cited by these authors.

IN CONCLUSION.

We feel warranted in saying with the utmost confidence, that the authorities above cited and quoted, sustain beyond cavil every proposition incumbent upon the appellee herein, complainant below, to maintain, to entitle it to have in the Federal Courts the relief and decree by it prayed for, and to the decree rendered in its favor by the Circuit Court, and affirmed by the Circuit Court of Appeals.

Respectfully Submitted,

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Thomas Emery
of counsel

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Filed Nov. 15, 1899.

Supreme Court of the United States

October Term, 1899.

No. 80.

GERTRUDE J. MILLS, Appellant,

v.

CEDAR POINT CLUB, Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

THOMAS KEENY,
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Solicitors for Appellee.

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SUPPLEMENTAL BRIEF FOR APPELLEE.

By way of addenda and supplemental to its brief heretofore filed herein, appellee submits the following propositions and athorities cited in support thereof:

1. That the survey and plat referred to in the patents issued to appellant's ancestors in title are by such reference made a part of the patent as fully and the same to all intents and purposes as if embodied in such patent.

This rule, manifestly correct in principle, is recognized and followed in a recent decision of the Supreme Court of California in the language following:

"The action was brought to recover the possession of certain land. The plaintiff is the owner, by title derived from the United States government, of the southeast quarter of section 13 in township 11 north, range 9 west, Mount Diablo base and meridan, and the defendant Polack is the owner of the northeast quarter of the same section. The official plat of the approved survey of the township located the premises in controversy in the northeast quarter of the section. The patent under which the plaintiff claims, describes the land conveyed as the southeast quarter of the section, 'according to the official plat of the survey returned to the general land-office by the surveyor-general". *Held*, that neither parol evidence nor a private survey was admissable to show that the premises in controversy were situated in the southeast quarter of the section.

"A map of a tract of land, having lines drawn upon it marking the boundaries and the natural objects upon its surface delineated, which is referred to in a deed containing a description of the premises therein conveyed, is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself.

Chapman v. Polack, 70 Cal. 487.

This Rice survey, field notes and map showed beyond question that the so called meander line bounding the survey upon which these patents were founded, was not the margin of any lake or bay or other body of water, but of a marsh; and that between such meander line and the lake there was a body of land varying from approximately a quarter of a mile to a mile and a half in width, which at times of exceptionally high water was properly designated as impassable water and marsh, but at its worst, clearly distinguishable from the lake and bay respectively adjoining the marsh.

2. That in order to entitle one to claim title by accretion or reliction, the burden is upon such claimant to establish that by the one or the other process a surface which was once a body or part of a body or stream of water has become land, and that he, or his ancestors in title by reason of ownership to the pre-existing shore was such riparian proprietor as that by reason of such proprietorship the thus created land constitutes an addition to his estate.

The change of character of which the law takes notice and upon which by its rules rights of ownership attach, has reference to substantial permanency. That is to say, such rule is not incident to mere temporary or perodically recurrent conditions existing either prior or subsequent to the change of character claimed. Such right does not attach to property whose natural or previously existing condition was that of being with more or less frequency submerged, but having the characteristics of swampy or marshy land, merely because it has become subject to submersion less deeply or less frequently. Nor to that which has been subject to such submersion as to properly constitute it a body of water, as a lake or pond, merely because during certain seasons of the year, or during exceptionally dry years the body of water may temporarily disappear and the land during such exceptionally dry season or years produce valuable herbage or vegetation. It is the substantially permanent condition that fixes character, and changed substantially permanent condition that must be shown to exist as the basis of any right that shall be claimed to attach to it incident to or consequent upon the change.

An instructive case upon this question is that of Sapp v. Frazier, decided by the Supreme Court of Louisiana, April 3, 1899. The case presented and the rules of law deemed controlling are thus stated in the opinion of the court, announced by BLANCHARD, J:

" Plaintiff, in 1896, acquired by purchase certain tracts of land fronting on Lake Bistineau, aggregating about 220 acres. The authors of his title had acquired the land from the United States. It is 'hill' land or 'uplands'. When, many years ago, the government surveyors ran the lines of the townships, and sectionized the lands of that region of the country, the tracts of land in question formed fractional sections, or parts of fractional sections. What necessitated these fractional sections was the existence of the lake and its omission from the survey. The front, or eastern and northeastern, sides of these fractional sections made a meander line, running around the west bank of the lake. Between the meander line and the other, or straight, lines of the fractional sections, the govern-

ment computed so many acres, and disposed of the land according to such computation. Lake Bistineau is a body of water situated in northwestern Louisiana, forming the boundary line between the parish of Bienville on the east and the parish of Bossier on the west, and extending up into the parish of Webster. The lake is 30 or 40 miles long, and from 1 to 2 miles wide. At its northern extremity Bayou Dorcheat flows into it, and through Loggy Bayou, at its southern extremity, the lake drains into Red River. The three (Loggy Bayou, Lake Bistineau, and Bayou Dorcheat) constitute a waterway of the United States, to improve which congress has repeatedly made appropriations of money, and through which steamboats approach within a few miles of the town of Minden, the county seat of Webster parish. Navigation through the lake for steamboats begins in January or February, and extends, through the spring months, into the early summer. The lake bed is covered with water from six to seven months in the year, and for five or six months, beginning in the summer, and extending through the autumn season, the greater part of its bed is uncovered, the waters receding and draining off into Red River. During the season when the water is down, what is called the 'low water channel', having the appearance of a small bayou, meanders through the bed of the lake. Through this drains the surplus water remaining in the lake, and that which comes into it from the summer and fall rains. Sometimes the water in this channel runs—there is a current—and sometimes there is none. * * * * * About 12 or 15 years ago a new kind of grass began to grow upon the lake bed immediately following the annual subsidence of its waters. This grass grows to a height of two or more feet, and so thick that it chokes out and destroys the cocklebur and other weeds and grasses where it appears. It is an excellent forage grass. Cattle graze and fatten upon it, and it was soon discovered that hay made from it was better than the best the market afforded. The result was that the people of that section of country began going upon the bed of the lake at the season when the grass was in condition, and cutting and bailing the hay, both for their own use and for market.

"At the point where the land which plaintiff's titles call for borders the lake, the latter is nearly two miles wide, and there this grass, so much in demand, seems to grow to the best advantage. Hence it was, and is, a favorite locality of the grass cutters, and, before plaintiff acquired his holdings, defendants and other persons were in the habit of cutting much hay there. Indeed, plaintiff seems to have been lured to that particular locality of the lake by the advantages mentioned and his investment in the uplands bordering the lake there induced by the same. He believed that, by acquiring the lands fronting on the lake he would take, as riparian proprietor, to the center of the lake bed, or to the low-water channel. He seems to have been the first to assert a right of this kind. Having purchased and taken possession, he announced his purpose to claim the right of ownership and of dominion to and over the lake bed in front of his holdings. Defendants Frazier and Noles, who lived near by, and who had been cutting grass there for several years,

were preparing to do so again in the summer following the purchase of plaintiff. They were on the ground with bailing press, mowers, etc., and had cleared away the bushes, erected a small cabin for shelter, and cut some hay. Plaintiff appeared, claimed the ground and the grass, forbade further cutting by defendants, caused one of them to be arrested for trespass, and then brought the present action to restrain them by writ of injunction from going upon that part of the lake bed or cutting grass there. In his petition he claims the ownership as riparian proprietor, by right of accretion or accession, of all the lake bed to the low-water channel in front of his land situated on the hills bordering the lake, and his prayer is that he be decreed the owner thereof, and the injunction be perpetuated. * * * * *

"The first inquiry arising is: Do plaintiff's titles, by their terms, embrace and include the land in the lake bed where defendants were cutting hay? They do not. There is no pretense that they do. The next inquiry is: Has there been formed, in front of his land bordering the lake, other land, either by accretion or dereliction, in the sense of the law, and susceptible of ownership; and, if so, when did it form; and, if formed prior to his purchase, did his vendors include the same in the sale to him? If the lake bed in front of his land comes under the denomination of neither accretion or dereliction, then it would seem that plaintiff has no right to fence defendants off such lake by either injunction, or rail, or wire. In the view we take of the case, it is not necessary to decide whether or not plaintiff has riparian rights as owner of the lands bordering the lake, nor whether or not the doctrine of 'limited fields'—'in agris limitatis' of the Roman law—applies to the titles by which he holds. Neither is it necessary or advisable, for us to inquire into the rights, if any, in and to the bed of the lake, appertaining to the United States or to the state of Louisiana; whether such bed does or does not attach to the public domain of the one or the other; whether or not the same is or is not susceptible of disposition under existing laws, by the one or the other, through their respective land departments; or whether or not congress in the one case, or the general assembly in the other, could otherwise dispose of same by legislative act. If we view plaintiff as owner of lands on the lake to which riparian rights may attach, does he take the lake bed in dispute as alluvion or reliction? From the definition of the word, 'alluvion' is the land formed by sedimentary deposits, and added to an ordinary tract by the imperceptible action of the waters bordering the latter. It is a mode of acquiring property by natural law, —'jure gentium,'—by those principles or maxims which regulated the conduct of men before the formation of civil society (Morgan v. Livingston, 6 Mart. [La]. 242), and is recognized by the statutory law as a means of the acquisition of property (Civ. Code, art. 509). 'Dereliction' or 'reliction,' is land added to a front tract by the permanent uncovering of the waters,—the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits causing the waters to recede. 'Dereliction' as used by the English law, meant when the

sea shrank back below the usual water mark, and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining. Morgan v. Livingston, 6 Mart. (La.) 244. It is recognized (excluding the sea) by the Louisiana law as a mode of acquiring property. Civ. Code, art. 510. But the mere temporary subsidence of the waters, occasioned by the seasons, coming in the winter and staying through the spring, going in the summer and gone through the autumn, does not constitute dereliction, in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. There is no 'increase of the land' in such case. The reliction must be from the waters in their usual state. Where it periodically rises up over the land, and then recedes, there is no reliction. Bouv. Law Dict. verbo 'Reliction;' Milne v. Girodeau, 12 La. 324; Zeller v. Yacht Club, 34 La. Ann. 839.

The lake bottom, where defendants were preparing to cut grass, cannot be said to be accretions, or alluvion, in the sense of the Code; for the testimony shows no alluvial or other deposit whatever has been made there for 40 years, or as far back as any of the witnesses who testified in the case had knowledge of. It cannot be dereliction; for the same witnesses testify to no change in the bottom of the lake, and no change in the characteristics of the lake, for 40 years. There has been no dry land formed by 'running water retiring imperceptibly from one of its shores and encroaching on the other'. Civ. Code, art 510. There has been no change in the shores of the lake. Its banks do not and have not caved. Nothing has been taken from one shore and added to the other. There has been no permanent uncovering of the waters, no laying bare of the bottom by the retirement of the waters to stay, and no shrinking back of the waters below the usual water mark, and the remaining of the same at the point of shrinkage. It is true its bed, or a large part of it, becomes measurably dry, and remains so, more or less, for four or five months in the year. But it becomes covered again with water, which remains over it for six or seven months, and in turn runs off, leaving the bed exposed, and this successive recurrence of conditions has been going on without any change from time immemorial. There has been no decrease in the depth of the water (from six to ten feet), covering the hay field in dispute, except such as might result from a larger volume of water filling the lake one season, and a less volume another season. But this is more or less an accidental fluctuation, depending on the rainfall of one season exceeding that of another, and the water in the Red River being higher one year than the next, or vice versa. * * * * * * There has been no increase of land, whether by alluvion or dereliction, between the tract occupied by plaintiff and the lake, since the date of his purchase; and there was none before. Therefore, under the law of Louisiana, there has been nothing for him to take, even giving him the benefit of the pretensions he asserts as riparian proprietor. The modes or ways of the acquisition of property are limited to those prescribed by law. Zeller v. Yacht Club, 34 La. Ann. 839. He must be held to have had no greater right to the

portion of the lake bed in dispute than defendants had, and no more right than they to cut grass there. It follows that no sufficient cause for the injunction herein sued out existed, and that the same was properly dissolved".

Sapp v. Frazier, 26 Sou. Rep. 378.

Like considerations constituted the basis of determination of a case very recently decided by the Supreme Court of Oregon, the point involved being stated in the syllabus, thus:

"In an action to recover possession of lands, where plaintiff, being owner of lots abutting on the meander line of the lake as shown by the government survey, claimed the lands in question outside of such line by reliction, and there was a question whether a lake existed in front of the lots at the time of the survey or since, instructions that the fact there may have been a meander line along the boundary of the lots is not conclusive evidence of the existence of a lake, and the jury must determine whether there was a lake adjoining said lots, and, if there was no such lake, they must find for the defendant, are proper."

And is more fully set forth in the opinion of the court, announced by WOOLVERTON, C. J.:

* * * * "Now the plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots, and upon which they abutted at the time after survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel, from natural causes, through a narrow reef or ridge extending across between Malheur and Harvey lakes, by which water of the former was drawn off into the latter, and a consequent reliction of the land bordering said lots, which constitute the land in dispute and to which plaintiff claims title. The defendant controverted this position and sought and introduced evidence tending to show the non-existence of the lake at the time of the survey and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur Lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of plaintiff, and that no part of it now or at the time of the survey extended westward in front or to the north of them. Several witnesses testified, in effect, that there was no open body of water of any moment in front of the lots; that the land was low and flat; that a portion of it was of a swampy or marshy character, but much of it—perhaps the greater portion—was dry, and not covered with water, except at certain seasons of the year, when the water was unusually high, and that it was the same character as some of the land that is comprised within the boundaries of said lots, and that this condition of affairs has existed since prior to the survey of 1877. Many circumstances were related tending to support the truth of the testimony. The issues of fact were clear and distinct, and, having been submitted to the jury there is no reason why their verdict should not preclude the plaintiff as in other cases where a jury has passed upon a submitted question of fact. If it be said that the result is a collateral impeachment of the government survey, the answer is decisive that the government ought not to be

precluded by a meander line which does not approximately and by general average border the banks of the stream or the shores of the lake which it is the purpose of a public survey to meander. If there was no lake to meander, the purchaser could not have bought upon the representation of the government that there was, and cannot become a riparian owner, and therefore can claim none of the rights appurtenant thereto. So, turn the matter which way we will, the facts do not present a case which, under the usual reasons assigned will preclude the government or its grantees. The result, that the plaintiff should acquire by the purchase of these lots several multiples of their area, as was remarked by Mr. Justice Brewer in his dissenting opinion in Mitchell v. Smale, supra, (140 U. S. 406) is 'certainly suggestive', and the case ought to be a clear one to support and sustain it. The instructions to the jury were in accord with the views here entertained, and hence there was no error in giving them".

French, etc. Co. v. Springer, 58 Pac. Rep., 102.

That ownership to the margin of the lake, and not merely to that of flats, swamp or marsh intervening between the survey and the body of water, is necessary to constitute one a riparian proprietor is well illustrated by the case of Sweringen v. St. Louis, recently decided by the Supreme Court of Missouri. The case presented is thus set forth in the syllabus:

"Where claimant's lands are separated from accumulated accretions by the land of another, however, narrow the intervening strip may be, or whatever the size of claimant's tract behind it, the accretion does not belong to the claimant.

"The boundary of a patent was a permanent line, fixed by metes and bounds, between high and low water mark. The accompanying survey showed a tract of several acres between the boundary of the survey and the river. *Held*, that any accretion to such strip between the river and the survey did not belong to the owners of the survey."

And in the opinion of the court, anounced by GAUTT, P. J.:

* * * * * "The tract in this case was confirmed, not only by fixed boundaries other than the river, but the exact number of acres was specified within that survey, and that survey, as to its quantity, excludes all idea that the United States was granting the 14 or more acres lying outside of that survey at the time it was made. The surveyor, moreover, says that Soulard's survey did not describe the meanders of the Mississippi, or of Rocky branch, and it was impossible to determine whether the difference in area was the result of miscalculation by Soulard or by the accretions; but whatever the cause of the discrepancy, the United States confirmed the last survey, which nowhere calls for the river as a boundary, and by that patent all these questions must be held to be forever settled. Our conclusion is that, as Labeaume was not a riparian owner, his heirs or grantees cannot recover the tract in suit as an accretion."

Sweringen v. City of St. Louis, 52 S. W. Rep., 346.

Another illustration of this is the recent decision of the Supreme Court of Nebraska, announced by NORVAL, J.:

"This is an action of ejectment brought by Willis Harrison to recover possession of certain real estate in fractional section 8, in township 12, north, of range 14 east, in Sarpy county.

"The defendants in their answer admit that plaintiff is the owner of forty acres of the lands described in the petition and disclaim any title to or interest therein, and deny that plaintiff has any title to the remainder of the lands.

"After the parties had introduced their testimony, the court instructed the jury to return a verdict for the defendants. Judgment was rendered upon the verdict in favor of the defendants, to reverse which plaintiff prosecuted error.

"Did the court err in taking the case from the jury? This must be answered in the negative, unless the evidence before the jury was sufficient to have warranted a verdict for the plaintiff. There is no conflict in the testimony. The plaintiff on the trial established a complete chain of title from the government of the United States to himself to an irregular tract, containing forty acres, being the same to which the defendants filed a disclaimer. The plaintiff seeks to recover a large quantity of land lying between the boundary of the forty acre tract and the present channel of the Missouri river, the claim being that said land is an accretion to his forty acre tract.

It appears that said fractional section 8 was surveyed by the United States in 1856. The east and south boundaries of the section consisted of a meander line near the west bank of the Missouri river. The certified copy of the field notes made by the United States surveyor of said survey were introduced in evidence, from which it appears that there was a strip of land between this meander line and the channel of the river. It further appears from the testimony of plaintiff's witnesses, and we fail to find any evidence in the bill of exceptions to the contrary, that the original survey did not extend to the river, and that the strip lying east of the meander line was covered with a growth of willows and cottonwoods at the time of the survey. While the testimony shows that this land was occasionally subject to overflow, yet it also appears that it lay above the usual stage of water in the river. Since said survey, and after the patent was issued for the forty acres, the channel of the river has changed further east a considerable distance. The plaintiff's claim to any portion of the strip lying between the meander line and the present channel of the river is not well founded for the reason that it is not an accretion to plaintiff's land. The case falls within the rule announced in Lammers v. Nissen, 4 Neb. 245, where it is held that 'an entry of government land, bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river.' To the same effect is Bissell v. Fletcher, 19 Neb., 725. We are satisfied that the evidence would not have warranted a verdict for the plaintiff. The court therefor did not err in directing the jury to return a verdict for the defendants. The judgment is affirmed. The other judges concur.

Harrison v. Sipes, 34 Neb., 431.

And to like effect is the decision of the Commission of Ap-

peals of the Supreme Court of Texas, wherein the opinion, reciting the facts presented, is anounced as follows:

WATTS, J., Com. App.—"There is no doubt but that land formed by gradual and imperceptible accretion, as well as that formed by the gradual and imperceptible receding of the water, belongs to the owner of the contiguous land. In this respect there is no distinction between land gained by accretions and that gained by the recession of the water. New Orleans v. United States, 10 Pet.; 662; County of St. Clair v. Lovington. 23 Wall., 46; Perry v. Pratt, 31 Conn., 442; Barrett v. New Orleans, 13 La. Ann., 105; Handly v. Anthony, 5 Wheat., 374.

"It is also true that the right to Alluvion depends upon contiguity; the accretions belong to the land immediately adjoining the water, however narrow it may be, and without regard to the size of the parcel behind it. Bates v. Illinois Central Railroad Co., 1 Black, 204; Saulet v. Shepherd 4 Wall., 502; Posey v. James, 7 Lea (Tenn.) 98; Bristol v. Correll county, 95 Ill., 84; Beaufort v. Duncan, 1 Jones (N. C.), 234.

"According to the finding of the court, in making the original survey the surveyor actually run the lines upon the ground according to the calls for course, distance and meanders of the bay front. At that time there was a shell reef extending from the boundary line of the survey made for Smith, assignee of Crocroline, to the south southeast about a half mile, varying in width from twenty feet to fifty or sixty yards, and in elevation from a few inches to six or seven feet. At the southeast extremity of this shell reef there was some low marshy land. That at the point where the line run by the surveyor in making the Smith survey crosses this reef, it was then about twenty or thirty feet wide.

"From this finding it will be seen that all that part of this shell reef lying to the south southeast of the boundary line of the Smith survey, running along the general front of the bay, was not included in that survey, and it may be assumed belonged to the state as unappropriated public domain.

"Now the accretion in controversy immediately adjoins and is contingous to this shell reef lying to the southeast of the Smith survey. This accretion is not contingous to the Smith survey, as claimed. But it seems that by gradual and imperceptible recession of the water, and by gradual and imperceptible deposit, a considerable body of land has been formed immediately contiguous to the shell reef, in the form of a small peninsula, the reef being the basis of the deposit and reliction.

"From these facts it will be readily seen that the made lands do not belong to the Smith surveys, but originally the state, and now the appellee, if he has secured the state's title, is the owner.

"The real point contended for by appellant is that as the calls of his grant are for the meanders of the bay according to certain calls for course and distance, that in the conflict the latter must yield to the former, and that being true, the Smith survey must be considered as embracing the shell reef.

"But it should be remembered that the actual survey as made

upon the ground, if it can be found and identified, controls. As is frequently said, the real object in applying the various calls is to find the footsteps of the surveyor. Where these are found and identified all classes of calls must yield to them.

"Here the court found, and upon sufficient evidence, that in making the Smith survey the surveyor in fact ran across the shell reef according to the call for course and distance. Hence according to the lines as actually run upon the ground, this shell reef, to the south and south east of where the line crossed it, was not included in the Smith survey.

"Our conclusion is that there is no error in the judgment, and we recommend its affirmance."

Fulton v. Frandolig, 68 Tex.,330.

In the case entitled state of California, et al, v. United States, et al, 24 Land Decisions, 68, which came before the Commissioner of the General Land office, and by appeal before the Hon. Secretary of the Interior, the question presented and decided by the latter, on January 30, 1897, is by the syllabus thereof fairly set forth in the following language:

"Where it is apparent from the record that in the survey of a township, a large body of land adjacent to a navigable lake has been omitted from actual survey, through the establishment of a meander line between alleged swamp and dry lands, instead of at the true shore line of the lake, a survey of the lands so omitted should be made.

"The claim of a state under the grant of swamp lands must fail if it does not appear that the lands were of the character granted at the date of the grant."

From the Hon. Secretary's opinion we quote as follows:

"The state of California and the swamp land claimants have not appealed; and to that extent at least they seem to have acquiesced in the decision of your office, and to abandon all claim of the lands in question under the acts of September 28, 1850, and July 25, 1866 (14 Statutes 219). This conclusion is placed beyond all doubt by the fact, that the swamp land claimants have employed special counsel to resist and oppose the homestead settlers' appeal. On page 2 the brief filed by said counsel it is said:

"The present brief is filed on behalf of John A. Fairchild and others, who are owners of tracts adjoining a portion of the land in controversy, and who seek an affirmance of the Commissioner's decision establishing their title as riparian owners.

"The plaintiffs manifestly expect, under color of riparian rights as recognized and enforced by your office decision, to accomplish the same practical results that they had hoped to attain by their petition as swamp land claimants. * * * *

"In the month of July, 1874, when United States deputy surveyor Alexander McKay made his survey of said township, he ran and established a meander line to mark the boundary between the 'plateau' of arable public land and the lands which he considered swamp and overflow and unfit for cultivation.

"The face of the map itself, and the application to the

map of the calls of the field notes of the meanders of the swamp and lake, respectively, show that in 1874 and 1879 there was in existence, uncovered and visible to the eye, a body of land called 'swamp' by the surveyors, and containing by estimation 7,080.69 acres, which was carefully segregated from the arable land and from the lake, by the inner and the outer meander lines delineated and described.

"It is plain that the pharse 'inner meander line' was understood by all parties to mean the meander line between arable land, on the one side, and swamp and overflowed land unfit for cultivation, on the other; and that the phrase 'outer meander line', meant the line along the shore of the lake proper, close to the water's edge, separating the water of the lake from the swamp and overflowed land.

"On February 4, 1880, the surveyor general furnished the new plat or map 'constructed in accordance with instructions'. It shows only the arable public lands which had been actually surveyed. The lines of the survey were closed upon the 'inner meander line', separating the arable from the swamp lands; and the fractional subdivisions thereby made necessary, were divided into lots and numbered. The new plat and the first plat were bound together in Volume 27 of the official maps of California, and thus remain of record in your office jointly as a delineation of the township. They show conclusively that none of the lots surveyed and numbered therein abut upon or adjoin Little Klamath lake, except lots, 4, 5 and 6 in section 25, which have not been disposed of by the United States.

"A further examination of the records of your office shows that only four patents have been issued for said lots, as follows:

"On May 6, 1887, to Jerome Churchill for lots 1, 2, 3, 4 and 5 of section 18 and lot 2 of section 19.

"On April 29, 1889, to Manuel J. Miller for lot 1 of section 30.

"On January 28, 1890, to Norris F. Skeen for lots 3, 4 and 5 of section 35.

"On November 9, 1891, to Annie E. Fairchild for lots 1, 2 and 3 of section 17, and lots 1 and 2 of section 20.

"Two of said patentees, Jerome Churchill and Annie E. Fairchild were original plaintiffs in this controversy. None of them have any riparian rights whatever. The lands granted by their patents were limited by the straight subdivisional and meander lines which defined the lots on the face of the map."

In like manner here the outer meander line or so called islands are shown by the survey and by every item of fact and evidence in the case to have been at the time of the Rice survey and ever since, the shore of the lake, and the inner meander line to have been that between the plateau or upland and the marsh.

In so far as there is evidence or fact in the case bearing upon that subject it is that the "islands have washed shoreward," or in other words the waters of the body of the lake instead of receding have advanced; so that instead of land area having increased by reliction it has been diminished by submersion. There has been

no new land made. The most that can be claimed is that the land is in lesser degree submerged than it was at the time Rice surveyed it and designated it a marsh. There is nothing showing either that it was at the time of the Rice survey with substantial permanence a body of water, nor that it has since become with substantial permanence anything other than a marsh. It was this marsh, and not the lake or bay that the lands of the appellant abutted upon, and private ownership in it is not affected by the degree of frequency with which the high waves from the lake or the drainage from adjacent uplands or both may temporarily submerge it.

Rice's segregation of it as marsh as distinguished from the lake or bay constituted affirmative notice to proposed purchasers of the surveyed land that this marsh intervening between the surveyed land upon one side and the lake and bay upon the others, was a proper subject of private ownership and as such subject to survey and sale whenever the government might deem it desirable to so deal with it, and hence that the surveyed land, not abutting upon lake or bay, ownership thereof would not carry with it any riparian rights. The propriety of this marsh, as it was at the time of and ever since the Rice survey, being regarded as not subject to the rules and incidents of land underlying the open waters of the body of the lake, but clearly distinguishable therefrom, and as such a proper subject of private ownership is so aptly and forcibly illustrated by a very recent decision of the Circuit Court of Appeals of the Sixth Circuit and the numerous authorities there cited, that we deem it proper to incorporate that decision in our brief. It is as follows:

"NAVIGABLE WATER—TEST OF NAVIGABILITY.

> In this country, waters, to be navigable in law, must be capable of navigation in fact as highways for the transportation of commerce. A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is throughout the remainder of its extent of an average depth of not more than 2 feet, and rarely more than 3 feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The Erie Shooting Club, the complainant below, is a shooting club incorporated under the law of Michigan. The object of the incorporation was to secure, hold, and protect suitable territory for hunting and fishing for the exclusive use of its members. In pursuance of this purpose, it has acquired by lease between three and four thousand acres of land, with exclusive right to hunt and shoot thereon the wild game and fowl which might frequent said property. The lands thus secured belong in fee to its members, who have leased to the club the exclusive rights mentioned. These lands consist of the shores and submerged lands constituting a shallow, marshy body of water, called "Maumee Bay," a bay or arm of Lake Erie, and lie in Monroe county, Mich. These sub-

merged lands were surveyed and platted and patented to the state of Michigan as swamp or overflowed lands, under the swamp land act of 1850. By grants from the state, and through mesne conveyances, all the lands included within its shores, including two small islands, have become private property. The Toledo Liberal Shooting Company is an incorporation of Ohio, and, like the Erie Shooting Club, is organized for the purpose of holding and protecting lands for the exclusive use of its members as a preserve for wild game, etc. It holds under lease about 106 acres of submerged lands in about the center of Maumee Bay, and entirely surrounded by the submerged lands held under lease by the Erie Shooting Club. With this exception, the Erie Shooting Club holds leases to the entire body of submerged lands within the shores of Maumee Bay, and also holds leases which include the shores of said bay and two small islands therein—one known as "Indian Island," and containing about 36 acres, and the other known as "Card Island," with an area of about 20 acres. The entire holdings of submerged and dry lands by the said Erie Shooting Club is between three and four thousand acres, much the greater part being submerged lands.

The bill of the Erie Shooting Club represented that the Toledo Liberal Shooting Company by its officers and members, was trespassing upon the property, by entering same "with boats and otherwise," "and had with guns shot and killed, destroyed, and scared away wild ducks and other wild water fowl thereon, both before and after sunrise, and at other times." This they are charged with as having frequently done, and against the protests and objections of complainant, and that "they threaten to continue so to do, etc. Other averments are also made as to the frequency with which this conduct has been persisted in, and as to the injury done and threatened to be done to the property of complainant. The prayer of the bill was that the defendants be enjoined perpetually from entering upon the said property, and from trespassing thereon, by shooting or otherwise destroying the wild fowl thereon. Certain individuals, being officers and members of the Toledo Club, were joined as defendants, and like relief was sought against them. The Toledo Club and its members made defendants joined in defending, and by answer denied that they collectively or individually had been guilty of tresspassing upon complainant's property, by shooting thereon, or by entering upon any dry land owned or rented by complainant. They assert that the submerged lands claimed by complainant are lands under navigable waters, and deny that any exclusive right to navigate said waters has been conferred upon complainant, its members or the lessors under whom they hold, and assert the right to go on and over said water in any way or direction for the purpose of reaching and hunting upon their own submerged lands. The answer admits that complainant has "the exclusive right to the game or wild fowl found on or over" the lands lawfully held by it under lease or otherwise. Much proof was taken, both as to the character and frequency of the alleged acts of trespass committed by the defendants, and as to the character of the water constituting Maumee Bay. Upon a final hearing, the circuit court

granted a perpetual injunction restraining defendants from entering upon the waters covering the submerged lands leased by complainant, in boats or otherwise, save by a prescribed route definitely fixed by the decree, and for the sole purpose of reaching the submerged lands leased by the defendant corporation. The decree also specifically and perpetually enjoined the defendants, their licensees or agents, from "hunting or shooting with guns," or in any manner "killing or taking wild fowl of any kind upon or over the water covering the lands of complainant." From this decree, defendants have appealed.

Willis Baldwin, for appellants.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This decree must be affirmed. The contention that the waters covering the submerged part of the lands claimed under lease by the Erie Shooting Club are navigable, and therefore subject to the public right of navigation, is not supported by the evidence in this record. The fact that this so-called "bay" was surveyed and plated as swamp land by the government affords a strong presumption against the navigability of the water thereon. This survey was under the authority of the government, which subsequently conveyed the lands so platted to the state of Michigan as swamp lands, under the act of September, 1850, known as the "Swamp Land Act." That the state subsequently conveyed them is a further circumstance tending to establish that no public easement had or could exist therein by reason of the navigability of the waters thereon.

Just where the so-called "bay" opens into the lake, at its southeast end, there is water navigable for ordinary commercial purposes. This channel rapidly shallows as the bay is penetrated. From a line drawn east and west through the center of sections 34 and 35 to the extreme northern end of this bay, a distance of over three miles, the average depth of water will not exceed two feet. There are places in which it is deeper, but in these it rarely exceeds three feet. There are large sections within the area mentioned, where the water does not average twelve inches; and considerable parts, especially in section 27, where it is not six inches in depth, except under unusual winds or freshets. An effort has been made to show that there are deeper and navigable channels permeating this shallow marsh. Several small creeks empty into this bay. The channels of one or more of these may be traced with difficulty in parts of the marsh. They soon cease to have any defined banks, and are lost in the wider waters, whose level is affected by the fluctuations of the lake. It is impossible upon this evidence to say that any one of these so-called "channels" is navigable. Their continuity is insufficient, and the proof as to their course and depth is altogether too slender and contradictory to justify a reversal of the decree below. From June to October, this body of water is covered with a mass of aquatic vegetation, such as wild rice, rushes, etc. It is then impenetrable, save by the laborious method of punting. At

no time is the greater part of this marsh susceptible of supporting "commerce," in any reasonable sense of the term. That the water stands permanently, and that it has a deep opening into Lake Erie, does not establish that this shallow body of water is capable of sustaining commerce, or is burdened with a public use. It is nothing more or less than a marsh opening into the lake. To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce.

None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term "navigable" had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes, which is the test. Gould, Waters, § 54, and cases cited; Barney v. Keokuk, 94 U. S. 324; The Daniel Ball, 10 Wall. 557-563; The Montello, 20 Wall. 430-441; Moore v. Sanborne, 2 Mich. 519; Chisolm v. Caines, 67 Fed. 285; City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661; Hall v. Alford (Mich.) 72 N. W. 137; Rowe v. Bridge Corp., 21 Pick. 344; Attorney General v. Woods, 108 Mass. 436.

In the case of The Montello, cited above, the court said:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted; and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable; but, in order to give it the character or a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

If this is a private property, it must follow that appellants have no right to trespass thereon. Their own property being inaccessible, save by going over that of appellee, entitles them to a way of necessity. That they obtained by the decree below. Decree affirmed.

Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. Rep., 680.

The facts which counsel are driven to claim as constituting a foundation for appellant's contention are that this more than four thousand acres of surface area between the surveyed lines of the lands patented to appellant's ancestor on the one side and the so-called islands on the other, was at the time of the survey in 1834 and 1835 and at the time the surveyed land was conveyed by the government in 1844, with substantial permanency a body of water such as the laws and regulations governing survey of the public lands authorized to be omitted from survey and sale; and that since that time its character has changed to that of substantial permanent land sufficiently discharged of water to become and be a proper subject of private ownership. The facts, however, are all the exact contrary of appellant's contention. They all support the correctness of the survey and report of surveyor Rice in designating it as marsh and not lake or bay and thus the manifestly apparent facts upon the ground, in harmony with the survey, field notes and plat informed the proposed purchaser of the surveyed lands that they did not so border upon either lake or bay as that ownership thereof would carry with it any rights of riparian proprietorship; and that this tract of marsh land intervening between the surveyed land and the lake was such land as was a proper subject of private ownership and subject to survey and disposal as such at the convenience of the government.

This marsh land thus being at all times, and by the government survey and plat at all times represented as being, a proper subject of private ownership; we submit that all the facts affirmatively exclude any and every hypothesis upon which that ownership ever became appurtenant to any estate of appellant in the lands included in the Rice survey and conveyed in pursuance of it.

Respectfully submitted

THOMAS EMERY,
Of Counsel.

POTTER & EMERY,
Solicitors for Appellee.

NILES *v.* CEDAR POINT CLUB.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 80. Argued November 16, 17, 1899. — Decided December 4, 1899.

Generally, in public surveys, a meander line is a line which courses the banks of navigable streams or other navigable waters; but in this case it distinctly appears from the field notes and the plat, that the deputy surveyor by whom it was surveyed in 1834 and 1835, and whose acts were approved by the surveyor general, stopped his surveys at what he called a marsh, which intervened between the point where he stopped and the waters of Lake Erie, and thus limited the land which the United States in 1844, following that survey, patented to the person under whom the appellant claims, and thus excluded the marsh, leaving to subsequent measurements the actual determination of the line of separation between the lands thus patented, and those which the Government did not propose to convey.

One receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of a surveyor, more land was bought than was paid for, or than the Government was offering for sale.

This marsh was properly held not to be regarded as land continuously submerged.

THIS controversy is between two claimants to land, one holding a patent therefor from the United States and the other claiming it by virtue of its contiguity to other land for which

a United States patent was held. A statement of facts was agreed upon by the parties, and that statement, with some slight additional testimony, formed the basis of a decree in the Circuit Court in favor of the plaintiff, which was affirmed by the Court of Appeals, 54 U. S. App. 668, to review which last decision this appeal was taken.

The facts are these: In the years 1834 and 1835 Ambrose Rice, a deputy surveyor, surveyed and subdivided into sections and quarter sections fractional township 9 south, in range 9 east, and townships 9 and 10 south, in range 10 east, the same being situated in the northern part of Ohio and adjacent to Lake Erie. From his field notes, duly certified to the surveyor general of that land district, the latter prepared a correct plat of the townships, showing the subdivisions thereof, and marking all the actual survey lines and the corners designated by said survey. By the field notes and plat certain sections appear to be fractional, the line on the north being meandered in a general direction from the northwest to the southeast. The tract to the north of this line was described as "flag marsh" and "impassable marsh and water." Paragraphs 4, 5 and 6 of said agreed statement of facts are as follows:

"4. Said plat showed the northerly line of the mainland portion of said survey, a line with its intersection of each township and section line, evidenced by a post placed at such intersection, as the said line was actually surveyed and marked as shown by said certified field notes, beginning on the west line of section 19, in town 9 south, range 9 east, and thence running in a general easterly and southerly, but meandering and tortuous course to and across the south line of section 11, in town 10 south, range 10 east.

"5. The said plat showed the said line of said survey from the west line of said township to a point 2 chains easterly from its intersection of the line between sections 21 and 22 in town 9, range 9, to be the shore of Maumee Bay; and from that point southerly and easterly the plat shows this line on the northerly and easterly sides of fractional sections 22, 27, 26 and 25 in town 9, range 9, sections 30, 31 and 32 in town 9, range 10, and sections 4, 9, 10 and 11 in town 10, range 10, to be the boundary

of what is called the 'flag marsh' and 'impassable marsh and water.'

"6. As shown in and upon said original plat, somewhat east of north from the point where this line of the survey crosses the north and south quarter line through section twenty-two, town 9, range 9, and about a mile and a half from it, began an island called Cedar Island. This extended northerly for more than half a mile, and then southeasterly to a point opposite the said line along the northerly side of section 25 in said township. A short distance southeast of this another island began and extended southeasterly beyond the north line of section 5, in town 10, range 10, projected easterly. Then there was a narrow inlet. A third island began on the easterly side of this inlet, and extended southeasterly almost to what would be the east line of section 11, town 10, range 10. Between these islands and the tortuous line above described was the space designated 'flag marsh' and 'impassable marsh and water.' No surveyed lines other than the township lines crossed either the intervening marsh or the islands. The northwestern island was named 'Cedar' and was the largest. The plat showed it as containing 53.83 acres, all in town 9, range 9. The one next east of it was marked as 'Sandy Island.' The plat showed that 7.52 acres of it were in town 9, range 9; 28.49 acres in town 9, range 10, and 1.18 acres in town 10, range 10. The southeastern island was marked as 'Crane Island,' containing 18.38 acres, all in town 10, range 10. From the northwest end of Cedar Island to the southeast end of Crane Island was about nine and one half miles. Norman Strait separated Cedar and Sandy islands. Lily Strait lay between Sandy and Crane, and Crane Creek entered the lake at the east end of Crane Island.

"The field notes on the plat showed that the circumference of each island was surveyed or meandered. The plat and marginal field notes also show that the southerly edge of the 'flag marsh,' 'impassable marsh and water' was surveyed, and that the lines of the fractional sections southerly of the said marsh and water were identical with the southerly edge of the marsh. The computed areas of the fractional sections and of their respective subdivisions, as shown upon the said plat, con-

formed to the area included within the said surveyed lines, and did not nor any thereof include any part of either marsh, water or islands."

In July, 1844, patents for several of these fractional sections facing on this marsh were issued to Margaret Bailey, under whom the appellant claims. The patents each recite the number of acres granted, and each states that the tract is a fractional section "according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey."

In 1852 the State of Ohio applied under the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519, for several thousand acres of lands within the State, among them these marsh lands. This application was, so far as these lands are concerned, rejected by the land department, the official minute on the application being "not swamp and nearly all sold." In 1881 John B. Marston, under instruction from the General Land Office, surveyed and subdivided into sections and quarter sections the area marked upon the surveyor general's plat, above referred to, as "flag marsh" and "impassable marsh and water." The field notes of this survey were returned to the General Land Office and approved, and a plat made, as required. Thereafter the lands thus surveyed and platted were patented by the United States, and the title so conveyed passed by subsequent deeds to the plaintiff below, appellee here. Disclosing the condition of these lands, paragraphs 16 and 17 of the statement of facts are as follows:

"16. At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage, and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from the large bodies of land now in Ottawa, Wood and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein.

"17. The general character, description and condition of the said land surveyed by said Marston was by him correctly set forth under the title 'General Description' in the field

notes of the said survey so as aforesaid by him certified to the Commissioner of the General Land Office.

"That concerning the portion of said survey in town 9 south, range 9 east, reciting, to wit:

"'The surface of that part of this fractional township, comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it, particularly in the south and west parts, are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which, without any well-defined channel, finds its way across the marsh to the lake. Again, in heavy gales of wind it is subject to inundations from the lake, which, upon the subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded along the lake by a sand beach averaging 1 chain in width and 3 feet in height.'

"That concerning the portion of said survey in town 9 south, range 10 east, reciting, to wit:

"'The surface of this fractional township is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the township south. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the drainage from woods on the south and west, which spreads over the entire surface and without any positive channel finds its way to the lake.

"'Again the township is subject to inundations from the lake during heavy gales of wind, which, upon the termination of the gale or a change in the direction of the wind, slowly finds its way back into the lake.

"'This fractional township is bounded on the northeast by Lake Erie; between the lake and the marsh proper is a sand beach, averaging 3 feet high and 1 chain in width, generally covered with bushes and small trees of oak, poplar, willow and cottonwood.'

"That concerning the portion of said survey in town 10 south, range 10 east, reciting, to wit:

"'The descripton for this township must necessarily be similar to that of the two preceding townships. The surface of that part of the township comprised in this survey is one large swampy marsh land, generally very wet and boggy. Its surface is covered with grass, canes, (or joint grass,) wild rice and such like marsh productions, reaching to a height of ten or more feet. Some parts, especially on sections 10 and 11, can be pastured, but the larger portion is filled with bogs and pond holes, connected by narrow and tortuous channels.

"'It receives the drainage from the woods on the south and west and is subject to inundations from the lake. On the prevalence of strong southwest winds this water flows from the marsh into the lake, and upon the occurrence of northeast winds the lake floods the marsh. The principal outlets and inlets are Crane Creek and Ward's Canal. This canal is an improvement made by C. B. Ward, of Detroit, Michigan, on section 4, and running across section 5 for the purpose of getting vessels and ship timber from his shipyard on section 5. It is built without locks and is really only a great ditch. Waterway, 50 feet; depth, 7 feet. The buildings (or sheds) at the fishing stations 4 and 11 are the only other improvements.

"'A comparison of the survey made by Ambrose Rice in 1834 and 1835 with that made by John B. Marston in 1881 indicates that Sandy and Crane Islands washed somewhat shoreward during the period intervening between the making of said respective surveys.'"

Mr. Henry T. Niles for appellant. *Mr. Frank C. Dougherty* was on his brief.

Mr. Thomas Emery for appellee.

Mr. Justice Brewer, after making the above statement of the case, delivered the opinion of the court.

But little can be added to the opinion of the Court of Appeals, whose conclusions we approve. The meander line

run by surveyor Rice along the northern borders of the tracts patented to Margaret Bailey may not have been strictly a line of boundary, *Railroad Company* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Horne* v. *Smith*, 159 U. S. 40; but it indicated that there was something which had stopped the survey, which limited the area of the land which the United States was proposing to convey, and left to subsequent measurements the actual determination of the line of separation between the land conveyed and that which the Government did not propose to convey. Generally, these meandered lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this "marsh" as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the Government was not intending to and did not convey any land which was a part of the marsh. "The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument." *Hardin* v. *Jordan*, *supra*. In *James* v. *Howell*, 41 Ohio State, 696, 707, the Supreme Court of Ohio, speaking of these very patents and this marsh, said: "The 'meander' line along the southerly border of the marsh was, in fact, intended to be the boundary line of the fractional sections."

It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the Government was offering for sale.

It may be true that under his contract, the requirements of the statute and the regulations of the land department, Rice should have extended his surveys to the shores of Lake Erie, but he did not do it; he stopped at the borders of this marsh, and the land department in effect approved his action. He evidently thought that the marsh was to be treated as a body of water, a conclusion not unwarranted in view of the finding of excessive high water at that time, but a conclusion which other findings show was not correct. And it may be remarked in passing that the letter of the statute would not limit the surveys to the shores of the lake, for section 2395 Rev. Stat. declares that surveys shall be by running lines at right angles "so as to form townships of six miles square, unless where the line of an Indian reservation or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

But Lake Erie is not an Indian reservation, nor a tract of land heretofore surveyed and patented, nor a navigable river. It is true section 2396, which provides how the boundaries and contents of the several sections, half sections and quarter sections of the public lands of the United States shall be ascertained, says, after stating the rule where all the corners are established, that "in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."

If this recognizes any other external boundary than that which is indicated in section 2395, it does not prescribe what that external boundary shall be; and if the land department treats either a marsh or a lake as such external boundary, who can declare that its action is void?

It is impossible to hold that the lower courts erred in the conclusion that this marsh was not to be regarded as land

continuously submerged, either under Lake Erie, a navigable lake, and in that case belonging to the State of Ohio, *Pollard* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *McCready* v. *Virginia*, 94 U. S. 391, or under a pond or other similar body of non-navigable inland waters, and therefore generally the property of riparian owners. It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the conditions as disclosed by the agreed statement indicate that it was a body of low swampy land, partly boggy and partly dry, sometimes subject to inundations from Lake Erie or the overflow of the adjacent streams, but not permanently covered with water.

Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh — whether it became more or less subject to overflow — would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line into the territory north.

But, it is urged, that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was "flag marsh," or "impassable marsh and water." But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation.

With respect to the contention that the character of this marsh, as it was found to have been, shows that it should have passed to the State of Ohio under the Swamp Land Act,

it is enough to say that the State of Ohio applied for it as such, that the application was denied, that this denial was made in 1852, that the land was never patented to the State, and without such patent no fee ever passed, *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, that subsequently the land department treated it as land subject to its control, as public land of the United States, had it surveyed, sold and patented. Whatever claims the State of Ohio may have cannot be litigated in this suit. The legal title passed by the patent to the appellee's grantors, and that title is certainly good as against a stranger with no equities.

We see no error in the decree, and it is

Affirmed.